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IN THE

Supreme Court of the United States

October Term, 1970
No. 849

Supreme Court, U.S.
FILED
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ROBERT C. FINLAYSON, SALLY HENDERSON [illegible]
of the Estate of ALBERT G. NEGRETTE, Deceased,
ALFONSO LAURA, CLIFFORD PARKS, et al.,

Petitioners,

vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a corporation, GEORGE D. WISEMAN, JOHN HENRY SMITH, and HONORABLE BRUCE R. THOMPSON, United States District Judge,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1970
No. .....

ROBERT C. FIELDING, SALLY NEUMEYER, as Executrix of the Estate of ALBERT G. NEUMEYER, Deceased, ALFONS LANDA, CLIFFORD JONES, *et al.*,

Petitioners,

vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a corporation, GEORGE D. WEBSTER, JOHN HENRY BREBBIA, and HONORABLE BRUCE R. THOMPSON, United States District Judge,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Robert C. Fielding, Sally Neumeyer, as Executrix of the Estate of Albert G. Neumeyer, Deceased, Alfons Landa, Clifford Jones, Edward J. Hellmer, Melvin S. Moss, Harry R. Lahr, David Goldwater, Robert C. Sheppard, William W. Francis, Delmar W. Holloman, Harry D. Fletcher, L. Robert Lacour, Paul G. Antony, William G. Rayson, John D. Pulliam, Cyril Bastian, H. Charles Kwasha, Charles H. Finkelstein, and James S. Ryan ["petitioners"] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered 14 August 1970, denying rehearing of that court's order filed 12

June 1970, summarily denying their Petition for Writ of Mandamus or Other Appropriate Writ.

Opinion Below.

The judgment of the Court of Appeals [Appendix A] has not been reported. No separate opinion was rendered by the Court of Appeals.

Jurisdiction.

The judgment of the Court of Appeals was entered 12 June 1970. A timely petition for rehearing with a suggestion of appropriateness that rehearing be in banc was filed in the Court of Appeals, and on 25 June 1970, the Court of Appeals requested respondents to answer the petition for rehearing by 9 July 1970. On 14 August 1970, the Court of Appeals entered its order denying the petition for rehearing [Appendix B]. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented.

Petitioners are being sued in the District Court in Nevada for $30 million damages by the Federal Savings and Loan Insurance Corporation ["FSLIC"] which is asserting criminal wrong-doing by petitioners when they controlled the management of a savings and loan association in Nevada. FSLIC presses a claim which it sought and obtained by assignment to it from the association, which is now in the control of petitioners' former lawyers (respondents Webster and Brebbia), who counseled petitioners for a number of years on the transactions which are the subject matter of the action pending in the District Court. FSLIC is represented in the District Court by counsel claimed by petitioners to have acted as legal counsel for one of their num-

ber in preparing the defense of the predecessor State court action filed on behalf of the association by respondents Webster and Brebbia. Moreover, one of the partners in the Los Angeles law firm now acting as counsel for FSLIC in this case was the General Counsel of the Federal Home Loan Bank Board when his agency hired FSLIC's private trial counsel. In addition, FSLIC is preparing its case against petitioners with the aid of investigative leads, including stolen lawyers' files, provided to FSLIC by respondents Webster and Brebbia. These investigative leads are the product of legal work done by Webster and Brebbia and other members of the Washington, D.C. law firm (including petitioners Holloman and Landa) which advised petitioners on the matters now in litigation in the District Court. The questions presented are:

1. Whether a Government entity, FSLIC, may utilize unlawfully obtained evidence and investigate leads, and the aid of two of petitioners' former lawyers, in preparing for trial an action based upon claims of alleged criminal wrong-doing on which the former lawyers counseled the petitioners;

2. Whether petitioners have the right to an immediate hearing in the District Court on their claims of conflicts of interests by their former lawyers, breaches of the lawyer-client privilege, and use by the Government of lawyers' files stolen by their former lawyers from some of the petitioners and their lawyers, and whether petitioners may be denied a "fruit-of-the-poisoned-tree" determination, before further pre-trial discovery use is made of the tainted information which the Government has obtained from petitioners' former counsel;

3. Whether FSLIC may prosecute such an action through counsel of record who formerly counseled, and received professional confidences from, a petitioner's decedent when he was a defendant in the predecessor State court action brought on the same claims by FSLIC's assignor; and

4. Whether FSLIC may be represented, in prosecuting a claim for damages principally for the account of a non-governmental assignor, by a private law firm which includes a general partner who was the General Counsel of the Federal Home Loan Bank Board at the time FSLIC hired the law firm to prosecute such claims.

Constitutional, Statutory, and Regulatory Provisions Involved.

The pertinent sections of the Constitution of the United States of America (Fourth and Fifth Amendments), the federal conflicts of interest law (Publ. L. 87-849, 18 U.S.C. §207(a)), the Federal Rules of Civil Procedure (Rule 52(a)), and the California Rules of Professional Conduct (Rules 5, 6, and 7) are set out in Appendix C.

Statement of the Case.

1. Procedural Background.

This Petition seeks to review a decision of the United States Court of Appeals for the Ninth Circuit which summarily denied a petition for a writ of mandamus or other appropriate writ and dismissed the proceeding without requiring respondents to answer the petition and without an oral hearing of the urgent questions presented. The mandamus proceeding was instituted by petitioners in the Court of Appeals in order to obtain review of two pre-trial final decisions rendered by respondent Honorable Bruce R. Thompson, United States District Judge for the District of Nevada. The mandamus proceeding was incident to an action in the District Court brought by a purported agency of the United States seeking $20 million compensatory damages and $10 million punitive damages.

In one decision, the District Court denied to petitioners a hearing on their six-part motion for injunctive relief sought to remedy the consequences of conflicts of interests, breaches of privileged communications between lawyer and client, and theft of lawyers' files by respondents George D. Webster and John Henry Brebbia. Petitioners alleged that such wrong-doing had infected the legitimacy of the main action in the District Court, brought by the Federal Savings and Loan Insurance Corporation ["FSLIC"] against some 30 defendants, arising out of claims of alleged negligent and fraudulent mismanagement of First Western Savings and Loan Association, Las Vegas, Nevada ["FWSLA"]. Therefore, petitioners requested a hearing to suppress such data in the possession of the Government as might be the "fruit-of-the-poisoned-tree". Petitioners

were denied such a hearing in the District Court, and their motion was denied on the merits, without findings of fact and conclusions of law, by a written order filed 28 May 1970 [Appendix D].

In the other decision, concerning conflicts of interests by FSLIC's trial counsel, the District Court held an oral hearing (no witnesses testified) and determined upon an evidentiary record restricted to affidavits of the parties involved and certain documentary exhibits, that a lawyer-client relationship was never established between petitioner Sally Neumeyer's decedent, Albert G. Neumeyer,[1] and the Los Angeles law firm appearing for FSLIC, Munger, Tolles, Hills & Rickershauser. Moreover, the District Court found, on partially conflicting affidavits, that Mr. Neumeyer freely consented to the Munger firm representing FSLIC in all matters arising out of Neumeyer's former connection with FWSLA and its corporate parent, First Western Financial Corporation ["FWFC"]. The District Court also held that the interests represented by the Munger firm in prosecuting the action for FSLIC, suing as an assignee of FWSLA and in its own right, are the same interests as those represented by the Munger firm partner, Alan J. Moscov, when he was the General Counsel of the Federal Home Loan Bank Board at the time that FSLIC hired the Munger firm to handle this case. The District Court's *ex parte* findings and conclusions on the conflicts of interests questions related to the Munger firm were filed 29 April 1970 [Appendix E] and ratified

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[1]Albert G. Neumeyer, a defendant in the main action pending in the District Court, died shortly after the limited issue conflicts of interest hearing in the District Court which was held in Reno, Nevada on 17 April 1970.

by the District Court by an order filed 26 May 1970 [Appendix F].

The District Court found that it had jurisdiction of the main action pursuant to 12 U.S.C. §1730(k) and 15 U.S.C. §78aa. *Federal Savings and Loan Insurance Corporation v. Fielding*, 309 F. Supp. 1146 (D. Nev. 1969) [Appendix G].

2. Statement of Facts.

On 12 November 1970, respondent FSLIC filed a 56-page complaint in the District Court in Las Vegas naming 33 defendants (20 of whom are the petitioners herein), asserting five claims for relief, sounding in common law tort and also purporting to arise under Section 10(b) of the Securities Exchange Act. The five claims asserted in the complaint are concisely summarized by the District Court in its opinion denying petitioners' motion to dismiss the action [Appendix G]. *FSLIC v. Fielding*, 309 F. Supp. 1146, 1148 (D. Nev. 1969).[2] In its complaint, FSLIC charges petitioners with numerous federal crimes.[3]

Informal negotiations were initiated by petitioners' counsel with FSLIC's Los Angeles trial counsel on or about 30 January 1969 with regard to a possible conflict of interest disqualifying the Munger firm on account of the professional relationship that had existed

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[2]The complaint appears as Exhibit 2 in the Appendix to the Petition for Writ of Mandamus or Other Appropriate Writ, filed in the Court of Appeals 8 June 1970. That appendix will be cited hereinafter as "M.A.". At this point, petitioners have not requested the Clerk of the Court of Appeals to certify and forward the voluminous Appendix to this Court.

[3]The complaint alleges petitioners and others have violated the following federal felony statutes: 18 U.S.C. §657, 18 U.S.C. §1001, 18 U.S.C. §1006, and 18 U.S.C. §1008 [M.A. Ex. 2, at pp. 27-36].

between one of the partners of that firm, Norbert Schlei, and Albert G. Neumeyer, deceased. Neumeyer was named as a defendant in the instant action and in a predecessor action based upon the same claims which was filed in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark by FWSLA and later assigned to FSLIC, whereupon that State court action was superseded by the instant action in the United States District Court in Las Vegas. Nothing concrete resulted from the informal talks between counsel. Accordingly, on 13 February 1970, before pre-trial discovery had commenced and before an answer was filed by the petitioners, petitioners' Los Angeles trial counsel wrote a letter, marked "personal and confidential", to the partners in the Munger firm who were concerned with the case, presenting petitioners' understanding of the facts and law related to the asserted conflict of interest by Norbert Schlei and a separate conflict of interest under 18 U.S.C. §207(a) affecting Alan J. Moscov.

The complaint was filed in the name of FSLIC through the office of the General Counsel of the Federal Home Loan Bank Board. The complaint was signed by the Munger firm as local trial counsel for the Government agency. In April, 1969, Alan J. Moscov, whose name appears on the complaint as the General Counsel of the Federal Home Loan Bank Board, resigned his Government office and became a partner in the Munger firm. He still occupies that position [M.A. Ex. 3].

The Munger firm replied by letter dated 17 March 1970 [M.A. Ex. 4], a copy of which they sent to the District Judge with a cover letter [M.A. Ex. 5] that also

transmitted a copy of the confidential letter of petitioners' counsel. The Munger firm asked that the matters raised by petitioners should be resolved by the District Court in chambers. The District Court did not accept the Munger firm's suggestion of *in camera* treatment of the conflicts issue.

By notice of motion filed 1 April 1970 [M.A. Ex. 1], petitioners formally requested eleven items of equitable relief from the Court based upon the conflicts of interests of Norbert Schlei and Alan J. Moscov [Appendix H], disqualifying the Munger firm, and upon the more flagrant conflicts of interests, breaches of lawyer-client confidence and fiduciary duty, and upon the taint to the Government agency's case, arising from such unlawful conduct by petitioners' former counsel, respondents Webster and Brebbia, as well as from the possession by the Government of lawyers' files on the case stolen by Webster and Brebbia in violation of a written agreement concerning custody of those files which belonged to the Washington, D.C. law firm of Davies, Richberg, Tydings, Landa & Duff [Appendix I]. Two of the petitioners, Alfons Landa and Delmar W. Holloman, were and are partners in that firm at all times pertinent to this case. Respondent Webster was first an associate and then a partner in that firm at all times pertinent to this case until March, 1967 when he withdrew. Respondent Brebbia was an associate in that firm from January, 1965 until March, 1967 when he and Webster joined the Washington office of Alston, Miller & Gaines, a law firm principally based in Atlanta, Georgia. The Davies firm acted as counsel for many of the petitioners in connection with the formation, development, and management of FWFC and its operating subsidiaries, including FWSLA.

Respondents Webster and Brebbia actively participated in the legal representation and counseling of many of the petitioners, and of FWFC and FWSLA, in connection with the matters of policy and practice which are placed in issue by FSLIC's complaint. Indeed, the uncontradicted record in the District Court on the Webster-Brebbia conflicts, set out in a 38-page affidavit summarizing various public records establishing the conflicts of interests, reflects that respondents Webster and Brebbia not only counseled petitioners on the matters in issue in this litigation, but negotiated on their behalf with the Federal Home Loan Bank Board and FSLIC, with the result that they (Webster and Brebbia) advised their clients to remove themselves from positions of management in FWSLA and FWFC and to cause Webster and Brebbia to replace them on the respective boards of directors. By December, 1966, Webster and Brebbia had effected such a shift in control of the two corporations so that Webster became the Chairman and chief executive officer of the holding company, FWFC, and Brebbia had become a director. In March, 1967, Brebbia was made President of FWFC.

Thereafter, respondents Webster and Brebbia commenced a course of conduct amounting to a breach of their professional obligations as lawyers and fiduciaries to the petitioners, by filing lawsuits against certain of the petitioners on behalf of FWFC and FWSLA on matters within their prior lawyer-client relationship to those defendants. For example, respondent Webster personally verified the complaint against petitioners Clifford Jones and Albert G. Nuemeyer, deceased, in an action for money brought in the New Castle County, Delaware Superior Court by FWFC in May, 1967 [M.A. Ex. 1, Rogers' Affidavit, pp. 13-14].

Upon joining the Washington office of Alston, Miller & Gaines in April, 1967, Brebbia undertook the task, as legal counsel to FWSLA, to investigate and advise whether the association had a cause of action against his former clients, two of whom (Landa and Holloman) had been his employers in the Davies firm until the previous month. The new board of the association then relied on the advice of respondents Webster (as chief executive officer) and Brebbia (as legal counsel) to file the State court action which was the predecessor of this action.[4]

The State court action was filed 23 May 1967, with respondent Brebbia as counsel of record for the association along with Webster's and Brebbia's new law firm, Alston, Miller & Gaines. Six of the petitioners herein were named as defendants. The gravamen of that complaint was alleged waste and mismanagement on the part of the former management of the association with a prayer for $20,776,000.00 in damages to FWSLA. The November, 1968 allegations of FSLIC in the instant action, which supplanted the Nevada action, are merely an elaboration of the charges first publicly made by Webster and Brebbia in their complaint filed for the association in May, 1967.

Within the next two weeks, the petitioners who were defendants in the State court action met with their attorneys at the Neumeyer residence in Beverly Hills, California. The meeting, which lasted several hours, was concerned with the defense strategy in that action. Present at the meeting, among other lawyers, was Nor-

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[4]Case number A-43922 in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark, styled *First Western Savings and Loan Association, etc. v. Melvin S. Moss, Albert G. Neumeyer, Robert C. Fielding, et al.*

bert Schlei, who came at the invitation of Albert G. Neumeyer. Schlei participated actively in the legal strategy discussion that day. Questions of personal jurisdiction, the merits of the claims asserted, and the prospective defense functions of the counsel present were discussed. Schlei's involvement on and before that day in the confidential lawyer-client discussions concerning the merits of the case was evidenced by a letter which he wrote to Neumeyer the next day, in which it was recorded that Schlei and Neumeyer had decided that for the time being, Neumeyer should allow a Las Vegas lawyer (Galane) to represent him along with the other defendants, at least for the time being, provided that Neumeyer gave certain cautions to be followed by Galane in pre-trial discovery.

Schlei seems to have prepared his own affidavit for the District Court in which he attempted, within the limits of candor, to bolster his law partners' contention that representation of the plaintiff in this action did not conflict with the firm's obligations to petitioner Neumeyer and to the other defendants common to the State action which was filed by FWSLA and the successor action which was filed by the Munger firm on behalf of FSLIC [Appendix J]. In attempting to deny the communication, by Neumeyer and the other lawyers and joint defendants present at the meeting, of privileged matter concerning this litigation, Schlei described his role as consulting defense counsel for Neumeyer, privy to the confidential statements of all the defendants in the State action concerning the truth or falsity of the allegations in the complaint. However, Schlei insisted that not much in the way of confidential matter was discussed. Moreover, he sought refuge in his

claimed lack of understanding of the complex facts discussed at the conference—"facts, incomprehensible to an outsider like myself. . . ."

Petitioner's decedent, Neumeyer, testified by affidavit shortly before his death that Schlei advised him in a private conference after the strategy meeting concluded that he had no liability based upon the facts alleged in the complaint.[5] In his affidavit, Schlei's version of his legal advice on Neumeyer's legal exposure under the FWSLA complaint is, at best, guarded, ambiguous, and not entirely responsive to the decedent's testimony of what he, as Schlei's client, understood his lawyer to be advising him.[6] The District Court heard no oral testimony on the Schlei conflict of interest motion.

The State court action was superseded by the District Court action filed 12 November 1968, by FSLIC, as assignee of the association. The State court action was voluntarily dismissed by FSLIC, purportedly without prejudice, on 11 May 1970.

In order to determine if it should take an assignment of the State court action, according to the affi-

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[5]Neumeyer stated in his affidavit: "Shortly after the June 6, 1967, meeting, Mr. Schlei personally advised affiant that he thought the entire case was ridiculous and that there was no cause of action; he further advised that even if everything pleaded in the complaint were true, so long as affiant didn't put money in his pocket there was no cause of action against him. Further, Mr. Schlei told affiant that 'they might find bad judgment, but not negligence to the point where they can get any money back.'" [M.A. Ex. 1, Neumeyer Affidavit ¶8, pp. 2-3, annexed as Appendix K].

[6]Schlei stated in his affidavit: "Mr. Neumeyer's affidavit [paragraph 8] attributed to me statements which were actually his statements, with which, in reliance on the facts he asserted, I did not disagree. I did state that damage is an essential element of a cause of action sounding in tort." [Appendix J, p. 4].

davit of Roderick M. Hills, a Munger firm partner, FSLIC retained the Munger firm on or about 4 September 1968 [M.A. Ex. 6, Hills Affidavit at p. 2]. No contact was made by any lawyer in the Munger firm with Albert Neumeyer, or with any of the other defendants in the State court action who attended the June, 1967, lawyer-client strategy meeting in Beverly Hills, until Schlei called Neumeyer on 21 October 1968. This first contact with Neumeyer occurred more than six weeks after Schlei's firm had undertaken the representation of FSLIC against Neumeyer and the other petitioners herein. Moreover, this telephone call followed by approximately one month the rendering of an opinion by the Munger firm to FSLIC that FSLIC should take an assignment of the State court action from FWSLA [Appendix L].

Schlei's own version of his telephone conversation with Neumeyer was, in substance, that the purpose of his call, at his law partner Hill's request, was to obtain a waiver of conflict of interest from Neumeyer [Appendix J]. However, Schlei conceded in his affidavit that he led Neumeyer to believe that the Munger firm had not undertaken representation of FSLIC on Neumeyer's case. Moreover, Schlei admitted that he told Neumeyer that his firm's role, at the outset of undertaking to represent FSLIC, would be "to review the whole situation involving . . . [Neumeyer], First Western Financial and First Western Savings and Loan Association, and make a recommendation as to what should be done. If the firm's recommendation should be that nothing further ought to be done, that presumably would be the end of the matter . . ." In other words, Schlei asked Neumeyer if Neumeyer would consent to

Schlei's firm acting as independent arbiter of the validity of FWSLA's pending lawsuit against Neumeyer and his co-defendants to see if, at some time in the future, FSLIC should take an assignment of that case from FWSLA.

Neither Schlei nor any other member of the Munger firm informed Neumeyer on or before 21 October 1968, that the Munger firm had effected a transfer of the causes of action (including the pending State court action) from FWSLA to FSLIC on 24 September 1968. No evidence was submitted by FSLIC tending to indicate that Neumeyer knew of the 24 September 1968, assignment before his purported waiver of the Munger firm's conflict of interest in the 21 October 1968, telephone call from Schlei.

Although Schlei was asked by his law partner Hills to confirm his telephone conversation with Neumeyer in a letter, Schlei claims that he told his law partner that, "I would be willing to do so if he or the Board's counsel felt it was essential, but would prefer not to do so since Mr. Neumeyer might find it insulting for me to write to him in a formal way about a subject on which we had on the telephone arrived at such a clear understanding." Within three weeks, Schlei's law firm sued Neumeyer and the other petitioners for $30 million, charging them with negligent mismanagement and fraud.

FSLIC's trial counsel has admitted to the District Court that they have in their possession thirteen files which were turned over to them by Webster and Brebbia and which they presume are files obtained from the Davies law firm.

Under powers conferred upon FSLIC by FWSLA under a loan assistance agreement dated 19 December 1966, FSLIC has the power to approve the persons who shall be directors of FWSLA [M.A. Ex. 2, at p. 5]. Under such an arrangement with FSLIC, Webster and Brebbia have been since December, 1966, and now are, the controlling management of FWSLA.

After the State court action was filed in 1967 and before FSLIC commenced this superseding action in the District Court, one of the petitioners, Robert C. Fielding, filed an action for breach of fiduciary duty against respondents Webster and Brebbia in the District Court in the District of Columbia. The facts alleged in petitioner Fielding's complaint against Webster and Brebbia constitute only a part of the facts establishing conflicts of interest which were presented by affidavit below in support of the six items of equitable relief related to Webster's and Brebbia's wrong-doing. On appeal from a dismissal of petitioner Fielding's complaint, the District of Columbia Circuit held that a claim for relief was pleaded against respondents Webster and Brebbia. *Fielding v. Brebbia*, 399 F. 2d 1003 (D.C. Cir. 1968) (Appendix L).

Reasons for Granting the Writ.

This petition presents several important and interrelated questions of conflicts of interests arising in the federal courts, coupled with the novel question of applying the "fruit-of-the-poisoned-tree" exclusionary rule to a civil action for compensatory and punitive damages brought by a Government agency on transactions alleged by that agency to constitute violations of not less than four felony statutes.

On one of the questions, the exclusionary rule applied to the Government as a plaintiff in a civil action, the Courts of Appeals are in direct conflict. The minority view, refusing to apply the exclusionary rule, is held by the Ninth Circuit, the court to which petitioners pray this Court will issue its writ of certiorari.

On the conflicts of interests questions, the Ninth Circuit has decided important questions of professional ethics and federal judicial procedure in a manner which conflicts with soundly reasoned earlier decisions of that same court.

Finally, with respect to the novel question of interpretation of the federal conflicts of interest statute, 18 U.S.C. §207(a), the Court of Appeals has refused even to consider a matter of first impression which has substantial importance in determining the scope and impact of a criminal statute regulating the professional activities of every former officer of the Executive Branch.

1. Does the Exclusionary Rule Apply to the Government as a Plaintiff in a Civil Action?

Petitioners requested the District Court to hold a trial-type hearing on their six claims for equitable relief before trial arising from the conflicts of interests, breaches of lawyer-client confidential communications, and theft of lawyers' files which they showed, by supporting affidavit, to have been committed by their former lawyers, respondents Webster and Brebbia. Without counter affidavits being filed, the District Court denied petitioners' request for a hearing and went on to deny petitioners' motion on the merits. No findings of fact and conclusions of law were made by the District

Court. However, in denying relief, the District Court said that, "[t]he history of litigation between these parties and plaintiff's assignor . . . leads to a conclusive presumption that use has already been made of facts and information known to and in the possession of Webster and Brebbia". [Appendix D].

The practical effect of this ruling was to permit the Government, as a plaintiff in the action, to continue using the information, obtained in violation of the criminal law and the rules of professional conduct regulating members of the bar, in pre-trial discovery proceedings against the interest of the former clients, with a view to developing competent evidence for use at trial in lieu of the tainted evidence upon which such discovery is grounded. With each question put to petitioners or other witnesses in the course of such discovery, FSLIC is aggravating and participating in the wrong done by petitioners' former lawyers to their own clients. By utilizing files on the matters in issue, stolen from petitioners and their lawyers by respondents Webster and Brebbia, and other privileged information, respondent FSLIC overtly attempts to build its case from evidence and investigatory leads which it has no right to possess.[7]

The Seventh and Second Circuits have each held that the exclusionary rule, applicable for years to the Government in its role as criminal prosecutor, see *e.g.*

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[7]FSLIC's role as a joint tortfeasor with Webster and Brebbia is particularly clear because of the power of FSLIC under the December, 1966, loan assistance agreement to approve of the board of directors of the assignor, FWSLA. Pursuant to FSLIC's power to select the management of FWSLA, since the assistance agreement, FSLIC has permitted Webster and Brebbia to control FWSLA and to abuse their professional trust to petitioners by filing the State court action, then assigning it to FSLIC.

Elkins v. United States, 364 U.S. 206, 217, 80 S. Ct. 1437, 1444 (1960), also restrains the use of unlawfully obtained information when the Government seeks civil relief from a private person in the courts. U.S. Const. Amends. IV and V; *Knoll Associates, Inc. v. Federal Trade Commission*, 397 F. 2d 530 (7 Cir. 1968); *Pizzarello v. United States*, 408 F. 2d 579 (2 Cir. 1969). *Cf. Iowa v. Union Asphalt & Road Oils, Inc.*, 281 F. Supp. 391, 409 (S.D. Iowa 1968).

In 1969, the Ninth Circuit declined to decide this question in an unusual case involving evidence unlawfully obtained in a foreign country, finding that it could decide the case on another ground. *Stonehill v. United States*, 405 F. 2d 738, 740, fn. 2 (9 Cir. 1968), affirming *United States v. Stonehill*, 274 F. Supp. 420 (S.D. Cal. 1967), *cert. den.* 395 U.S. 960, 89 S. Ct. 2102, *reh. den.* 396 U.S. 870, 89 S. Ct. 2102 (1969). However, the question was finally determined by the Ninth Circuit within the ensuing year, and the court expressly rejected the contrary holding of the Seventh Circuit in the *Knoll Associates* case. *National Labor Relations Board v. South Bay Daily Breeze*, 415 F. 2d 360, 364 (9 Cir. 1969), *cert den.* .... U.S. ...., 90 S. Ct. 919 (1970).

Accordingly, the Ninth Circuit has adhered to the view that the furthest reach of the exclusionary rule is the quasi-criminal prosecution, *e.g.* car forfeiture proceedings. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S. Ct. 1246 (1965). The Ninth Circuit chose to disagree with the Seventh and Second Circuits and to permit the Government to use unlawfully obtained evidence as a civil plaintiff, notwithstanding its earlier decision, inconsistent in basic principle, that a private person, anticipating federal

criminal prosecution, could sue the Government in a plenary action to recover unlawfully obtained records and the tangible evidentiary fruits thereof. *Goodman v. United States*, 369 F. 2d 166 (9 Cir. 1966). In deciding the *Goodman* case for the taxpayer, the Ninth Circuit quoted the language of Mr. Justice Holmes relied upon by the District Court in Iowa in the *Union Asphalt* case, *supra* (at p. 409, 281 F. Supp.), in holding that the exclusionary rule applied to a State government suing for treble damages under the Sherman Act. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S. Ct. 182, 183 (1920).[8] However, in rejecting the applicability of the exclusionary rule in civil actions brought by the Government in the *Daily Breeze* case, *supra*, the Ninth Circuit did not allude to the teaching of the *Silverthorne* case.

Where the Government has asserted in its complaint that petitioners are liable in the sum of $20 million compensatory damages and $10 million punitive damages on account of alleged acts, which, the Government contends, constituted violations of not less than four federal felony statutes, it would seem even more anomalous to permit the use of unlawfully obtained evidence in this case than this Court found it would be to allow its use in a civil car forfeiture case that also required the same proof that would be excludible in a criminal proceeding on the same facts. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 701, 85 S. Ct. 1246, 1251 (1965).

Although petitioners expressly raised the exclusionary rule as an inevitable corollary of their mandamus

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[8]Mr. Justice Holmes held: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."

proceeding"—the only proper means of obtaining review of the District Court's treatment of the conflicts of interests issues according to the decisions of the Ninth Circuit, *Cord v. Smith*, 338 F. 2d 516, 521 (9 Cir. 1964); *Chugach Electric Association v. U.S. District Court*, 370 F. 2d 441, 442 (9 Cir. 1966)—the Court of Appeals refused to direct respondents to answer the petition and dismissed the petition without permitting a hearing [Appendix A]. The decision by the Court of Appeals can be understood in only one of two ways. Either it is an affirmation of its decision in the *Daily Breeze* case, *supra*, to refuse to follow the Seventh and Second Circuits in applying the exclusionary rule to civil actions brought by the Government; or, the decision rests upon the implicit repudiation of the Ninth Circuit's own holdings in the *Cord* case, *supra*, and the *Chugach Electric Association* case, *supra*, that conflicts of interests by counsel, whether directly or indirectly involved in litigation in the federal courts, will be prevented *promptly before trial* by means of petitions for extraordinary relief under the All Writs Statute, 28 U.S.C. §1651, which bring such conflicts to the Ninth Circuit's attention. See esp. the opinion of the Ninth Circuit on application to clarify its mandate in *Cord v. Smith*, 370 F. 2d 418, 424 (9 Cir. 1966).

"The point was also preserved in the District Court by citation to the court of the *Alderman* case as the procedural standard for the "fruit-of-the-poisoned-tree" hearing that petitioners had requested. [M.A. Ex. 14, at p. 36]. *Alderman v. United States*, 394 U.S. 165, 89 S. Ct. 961, *reh. den. sub. nom. Ivanov v. United States*, 394 U.S. 939, 89 S. Ct. 1177 (1969); opinion on earlier pet. for *reh. sub. nom. Kolod v. United States*, 390 U.S. 136, 89 S. Ct. 752 (1968).

2. The Court of Appeals Has Ignored Its Own Recent Decisions Which Require Prompt Hearing Before Trial on Claims That Counsel Should Be Excluded From Direct or Indirect Participation in the Case Because of Conflicts of Interests.

In seeking review by this Court of the summary dismissal by the Court of Appeals, petitioners are not merely asserting that the Court of Appeals committed error in failing to overturn a decision of the District Court when it denied their motion for pre-trial injunctive relief arising from conflicts of interests by counsel and from the Government's use against them of privileged information and stolen records. Petitioners are also contending that it was fundamental procedural error to deny to them equitable relief, granted by the Ninth Circuit in earlier cases having less clear records of actual conflicts of interests, without even permitting petitioners an evidentiary hearing in the District Court.

On six of the eleven items of injunctive relief which petitioners sought below (concerning the wrong-doing of respondents Webster and Brebbia), the District Court denied petitioners' motion without allowing them a hearing, despite the failure of respondent FSLIC to file any affidavit in opposition to petitioners' *prima facie* showing of a right to such relief. Since no adversary hearing was held, the District Court could make no findings of fact and conclusions of law on the Webster-

Brebbia portion of the motion for injunctive relief. None were made.[10]

In their motion in the District Court, petitioners had followed the controlling decisions of the Ninth Circuit for testing asserted conflicts of interest by counsel. *Cord v. Smith*, 338 F. 2d 516, 519 fn. 1 (9 Cir. 1964). Promptly upon denial of a hearing and of all relief by Judge Thompson, petitioners followed the rule of the Ninth Circuit that the proper means of obtaining review of an order denying a motion to remove counsel from direct or indirect participation in a case in which he had a conflict of interest was to petition for a writ of mandamus. *Cord v. Smith*, 338 F. 2d 516, 521-522 (9 Cir. 1964).

In deciding to treat Cord's appeal as a petition for a writ of mandamus, the Ninth Circuit described the sound reason for granting interlocutory review of lawyer-client conflicts questions under the All Writs Statute:

> ". . . Continued participation as an attorney, by one who is disqualified by conflict of interest from so doing, will bring about the very evil which the rule against his participation is designed to prevent, and a subsequent reversal based upon such participation cannot undo the damage that will have been done as a result of such participation." *Cord v. Smith, supra*, at p. 522.

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[10]But see Appendix A, in which the Court of Appeals indicates that it has approved and adopted the findings and conclusions of the District Court which only cover five of the eleven items of relief sought by petitioners.

The liberal view previously adopted by the Ninth Circuit in protecting client-litigants from their former lawyers is further demonstrated in a later conflicts decision which removed the plaintiff's counsel in an antitrust case even though the facts of the case did not arise until after he had ceased to act as counsel for the defendant. The Ninth Circuit reasoned that:

> "A likelihood here exists which cannot be disregarded that Mr. Boyko's knowledge of private matters gained in confidence would provide him with greater insight and understanding of the significance of subsequent events in an antitrust context and offer a promising source of discovery." *Chugach Electric Association v. United States District Court for the District of Alaska*, 370 F. 2d 441, 443 (9 Cir. 1966).

The financial wrong-doing alleged in respondent FSLIC's complaint embraces the period from an unstated time prior to 22 June 1961 until on or after 1 December 1966. During the entirety of this six and one-half year period, respondent Webster was one of the counsel, and ultimately the principal counsel, for petitioners in connection with all of their affairs having to do with the business of FWFC and FWSLA, the subject of FSLIC's complaint.

The limited burden of proof required to obtain complete ouster of a former lawyer from current litigation was clearly carried by petitioners in their uncontradicted motion papers concerning relief against Webster and Brebbia. Under the Ninth Circuit's own authority:

> "The petitioner does not have the burden of specifying the secret and confidential information which was available to Mr. Boyko. Such specifica-

> tion might entail disclosure of the very confidences the Canons seek to protect. It must be remembered that the attorney in such situations as this does not have the shelter enjoyed by a defendant whose adversary must meet a burden of proof. Where conflict of interest or abuse of professional confidence is asserted the right of an attorney freely to practice his profession must, in the public interest, give way in cases of doubt." *Chugach Electric Association v. U.S. Dist. Ct., etc., supra,* at p. 444.

Moreover, the Ninth Circuit has held that counsel would not be permitted to evade the rules of disqualification by participating in the development of the litigation in some manner other than as counsel of record:

> ". . . We do hold that under our mandate, Young is not entitled to participate in the case in any manner, either as an attorney or as a party, or to maintain an action against Cord based upon the claimed assignment. *And he may not, as we indicated in our prior opinion, assist Smith or his attorney by consultation or advice." Cord v. Smith,* 370 F. 2d 418, 424 (9 Cir. 1966) [Emphasis added].

Thus, the propriety of injunctive relief effectively removing Webster and Brebbia from assisting FSLIC in this litigation is no less clear by reason of the fact that Webster and Brebbia are not counsel of record for the plaintiff, having arranged with FSLIC to prosecute as assignee the action which Webster and Brebbia commenced against their former clients. Nor is petitioners' reliance upon the Ninth Circuit's disqualifica-

tion decisions misplaced because Webster and Brebbia have turned over stolen lawyers' files to FSLIC for use against their former clients rather than using the stolen files themselves directly against petitioners.

The District Court in the Southern District of Texas has recently excluded New York lawyers, not appearing of record in the action, from having any role in the civil prosecution of the defendant in the Texas court, where the defendant had been one of joint clients formerly represented by the New York firm. The action between the two former joint clients (a corporation and its former regional manager) required the removal of the plaintiff's New York counsel even though they were not of record in the action. *E. F. Hutton & Company v. Brown*, 305 F. Supp. 371, 378-382 (S.D. Texas, 1969).

Petitioners submit that the summary dismissal of the mandamus proceeding in the Court of Appeals and the denial of a hearing in the District Court on petitioners' susbstantial showing of grave conflicts of interest and criminal violations by respondents Webster and Brebbia against the interests of their former clients,[11] constituted an unexplained and unjustified departure from the controlling decisions of the Ninth Circuit which prevent lawyers from abusing the special trust and confidence intended to be reposed in them by their clients. The failure of the Court of Appeals to apply to this case its own clear rules of disqualification and requisite ancillary relief is particularly disturbing to the body of law regulating the conduct of

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[11]See *e.g.* the American Bar Association's Code of Professional Responsibility, Canon 4 and Disciplinary Rule 4-101, and Title 21, District of Columbia Code §§1301, 2201-2202.

lawyers in cases pending in the federal courts, because of the function being performed in the pending action below by an agency of the United States, *viz.* collaborating with Webster and Brebbia to utilize the fruits of their wrong-doing. Moreover, the decision below seems to be in unseemly conflict with the decision of the District of Columbia Circuit in petitioner Fielding's individual tort action against respondents Webster and Brebbia. *Fielding v. Brebbia,* 399 F. 2d 1003 (D.C. Cir. 1968).

3. The Court of Appeals Has Refused to Review an Order Permitting FSLIC's Trial Counsel to Prosecute a Claim Initiated Against Petitioners by a Partner in the Trial Counsel's Firm Who Counseled With Some of the Petitioners on This Litigation.

The District Court did make findings of fact and conclusions of law with respect to the five items of injunctive relief sought by petitioners with respect to the conflict of interest affecting the Munger law firm by reason of the role played by one of its partners, Norbert Schlei, in the defense of the predecessor State court action filed by Webster and Brebbia against six of the petitioners [Appendix E]. In summarily denying the petition for a writ of mandamus, the Court of Appeals denied the petitioners a hearing and approved and adopted the findings and conclusions of the District Court [Appendix A].

The issue of whether Schlei and his law partners had a conflict of interest was resolved by the District Court upon affidavits and counter affidavits filed by the parties and their counsel. No oral testimony was taken before the District Court; therefore. to the extent that witness credibility might have been in issue,

the District Court had no special advantage over an appellate court in weighing the evidence and resolving such conflicts, if any.[12] Moreover, on the ultimate questions (1) of whether Schlei counseled Neumeyer on this litigation, (2) of whether Schlei was privy to confidential communications from Neumeyer privately and from several other petitioners during the joint client-counsel strategy meeting, and (3) of whether Neumeyer for himself waived the lawyer-client privilege and Schlei's conflict of interest, the issue presented on review was not one of factual conflict between Neumeyer's and Schlei's affidavits, but of the inferences that should be drawn by a court on the undisputed facts.

Thus, the findings and conclusions of the District Court that no lawyer-client relationship ever came into existence between Schlei and Neumeyer, and that if one did it waived in the 21 October 1968, telephone call from Schlei, are not entitled to the special weight generally accorded to findings on disputed records of live testimony. The appellate courts can evaluate the question of lawyer-client status for themselves in order to determine whether the trial court has erred in its application of the rules of professional conduct to be observed in the federal courts. *Cf. Teamsters, Chauffeurs, etc. v. Billington*, 402 F. 2d 510, 512 (9 Cir. 1968); *Central Railroad Company of N.J. v. Manufacturers Hanover Trust Company*, 421 F. 2d 604, 606 fn. 5 (3 Cir. 1970).

In the context of the other conflicts of interest and the possession by FSLIC's trial counsel of files stolen

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[12]Rule 52(a), F. R. Civ. P. *Mobil Tankers Company v. Mene Grande Oil Company*, 363 F. 2d 611, 613 (3 Cir. 1966); *Best Medium Pub. Co., Inc. v. National Insider, Inc.*, 385 F. 2d 384, 386 (7 Cir. 1967); *Kulukundis v. Strand*, 202 F. 2d 708, 709-710 (9 Cir. 1953).

from petitioners' lawyers, the conflict of interest on the part of FSLIC's trial counsel renders the decision of the Court of Appeals particularly disruptive to the body of law regulating conflicts of interest by counsel. Moreover, the conflict of interest of the Munger firm is aggravated here because of the legal advice given in June, 1967, by one of its partners to the decedent Neumeyer that he had no legal liability on the claims advanced by FSLIC's assignor in the predecessor State court action. Thereafter, Schlei's firm, representing the Government, sued Neumeyer on the claim which had been totally disparaged to Neumeyer by Schlei. Finally, the conflicting professional relationship between Schlei's that FSLIC alleges in its complaint that the wrongdoing of the petitioners included the use of the Neumeyer Foundation as a recipient of gifts of FWFC stock.[18] In his affidavit, Schlei admitted that he served for several years on the Advisory Committee to the Neumeyer Foundation. [Appendix J]. This is an allegation which did not appear in the complaint filed by Webster and Brebbia in FWSLA's State court action. It would appear to be a new allegation that was added by FSLIC's law firm at a time when it included a partner who had special knowledge of the foundation and its founder, by reason of his professional and social relationship with Neumeyer and by reason of his membership on the Advisory Committee of the Foundation.

With this uncontradicted factual background, the conclusion that Schlei and his law partners have no conflict of interest, either with the decedent Neumeyer

[18]M.A. Ex. 2, at p. 39.

or with the other petitioners who were involved with Schlei in the June, 1967, defense strategy meeting, is totally without support in the record. Accordingly, the Schlei conflicts issue should have been considered by the Court of Appeals when it was properly presented by mandamus petition. *Cord v. Smith*, 338 F.2d 516 (9 Cir. 1964).

The question of whether an attorney-client relationship existed between Schlei and Neumeyer is a question of law, and having been resolved by the District Court upon a record restricted to affidavits, it was one on which the appellate courts need not defer to the trial court. *Kraus v. Davis*, 3 Cal. App. 3d 484, 491, 85 Cal. Rptr. 846, 850 (1 Dist. 1970). California law would appear to be the most persuasive source of law to resolve this question in view of the fact that Schlei was licensed and practicing in that State when the claimed lawyer-client relationship existed. In addition, the consultations between Schlei and Neumeyer on the subject of this case occurred exclusively within the State of California.

In the most recent California decision on the question of disqualification of counsel on the ground of conflict of interests, the Court of Appeal premised its discussion of the facts upon the principle that a lawyer and his entire law firm were disqualified from representing a party in litigation if the lawyer merely had had access to confidential information from the adversary in the case.[14]

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[14]In *Kraus v. Davis*, 6 Cal. App. 3d 484, 491, 85 Cal.Rptr. 846, 850 (1 Dist. 1970), the Court of Appeal applied the following disqualification test:

> "By reference to the law of privileged communications, the appealing defendants indicate that the principle pro-

Both Neumeyer and Schlei were in agreement that the discussion of the lawyers and clients at the June, 1967, defense strategy meeting embraced the facts and law on the jurisdiction and merits of the Nevada court action. Both men also agreed in their affidavits that Schlei and Neumeyer discussed between themselves the question of whether Neumeyer had any liability under the complaint. Schlei offered no reason for his presence and participation at Neumeyer's request in this joint defendant-lawyer meeting except the one most natural to presume, *viz.* that Neumeyer sought and obtained from him legal advice about how to defend himself against the Webster-Brebbia complaint. Schlei gave legal advice to Neumeyer about this litigation both orally and in a letter on the stationery of the Munger firm [Appendix K]. Before the Munger firm commenced this superseding action against Neumeyer and his co-defendants, Schlei had become a partner in the Munger firm.

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hibiting employment adverse to a client or former client should apply to those who acquired confidential information while employed by the complaining party's attorney or former attorney. (See Code Civ.Proc., former §1881, subd. 2; Evid.Code, §§950-954; and City & County of S. F. v. Superior Court (1951) 37 Cal. 2d 227, 334-237, 231 P. 2d 26.) The Code of Civil Procedure, formerly referred to 'an attorney's secretary, stenographer, or Clerk' (§1881, subd. 2), and the Evidence Code refers to 'those who are present to further the interest of the client in the consultation' and 'those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted.' (§952.) *It may be assumed for the purposes of this case that Duncan would be barred from participating in this case* if he either was a partner or otherwise associated as an attorney in the representation of the complaining parties, or *if*, as an independent associate, *he in fact acquired confidential information concerning the affairs of those parties.*" [Emphasis added].

The Court of Appeals erred not only in failing to review the legal conclusion of the District Court concerning the existence *vel non* of a lawyer-client relationship between Schlei and Neumeyer, it also erred in failing to review the alternative conclusion that a possible conflict of interest was waived by Neumeyer when Schlei called him after the Munger firm was retained to sue Neumeyer *et al.* However, that conclusion finds no factual support either in Schlei's or Neumeyer's affidavit. Both men agreed that Schlei told Neumeyer that his firm merely contemplated the task, in the future, of advising FSLIC on whether the pending State court action had merit and whether it should be taken over by FSLIC from FWSLA.

If Neumeyer consented to anything, it was only to the future services of the Munger law firm as counsel to evaluate for FSLIC the justice of the cause filed by Webster and Brebbia against their former clients. Undoubtedly, Neumeyer believed that his friend and former lawyer, Schlei, would give his case a more fair and independent consideration than had been afforded by Webster and Brebbia. But Schlei did not tell Neumeyer that his law firm had previously made its judgment that FSLIC should take over the case. Nor did Schlei tell Neumeyer that his firm had effected the transfer of the causes of action from FWSLA to FSLIC several weeks before Schlei called Neumeyer seeking consent.

Thus, there is no evidence to support the District Court's conclusion that Neumeyer consented to the con-

flict of interest on the part of the Munger firm, because California's Rules of Professional Conduct, Cal. Bus. & Profs. Code foll. §6068 provide that:

> ". . . A member of the State Bar shall not acquire an interest adverse to a client (rule 4), and he may not represent conflicting interests except with the consent of all parties concerned, given *after full knowledge of all of the facts and circumstances.*" *Lee v. State Bar of California,* 2 Cal. 3d 927, 88 Cal. Rptr. 361 370 (1970). [Emphasis added].[15]

Neumeyer was not informed that Schlei's firm had decided to sue him for negligent and fraudulent mismanagement on behalf of FSLIC. *Cf. Lysick v. Walcom,* 258 Cal. App. 2d 136, 65 Cal. Rptr. 406, 414 (1 Dist. 1968). Thus, the conflict of interest could not have been waived and was not waived by Neumeyer.

It was prejudicial error for the District Court to conclude that a valid consent existed, and it was prejudicial error for the Court of Appeals to refuse to entertain a hearing on petitioners' request for review of the denial of disqualification by writ of mandamus proceeding. That refusal was in conflict with the controlling decisions of the Court of Appeals. *Cord v. Smith,* 338 F. 2d 516, 521-522 (9 Cir. 1965). *Chugach Electric Association v. U.S. District Court,* 370 F. 2d 441, 442 (9 Cir. 1966).

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[15]See also Rules 5, 6, and 7 of the Rules of Professional Conduct, Cal. Bus. & Profs. foll. §6068 [Appendix C].

4. The Munger Law Firm Also Became Disqualified to Continue Representing FSLIC Once the General Counsel of the Home Loan Bank Board Became a Partner in the Firm.

Alan J. Moscov appears as a signatory on the complaint in this action in the capacity of the General Counsel of the Federal Home Loan Bank Board. After the complaint was filed, Moscov resigned his official position and became a partner in the Munger law firm. The Munger firm, although representing FSLIC in this litigation, is also representing the financial interests of FWSLA, the private entity which has assigned the claims on which FSLIC is suing petitioners and others.

The Munger firm is representing FWSLA's financial interests in this litigation because of the following provisions of the Assignment and Agreement dated 24 September 1968 [Appendix L]:

> "(3) Any proceeds from these claims, including settlement of them, shall be used first, to reimburse the Corporation for all expenses incurred by the Corporation in the pursuit of such claims, including but not limited to attorneys' fees, travel expenses, court costs, and all related litigation expenses, and all actual costs of the Corporation that may be fairly prorated to the pursuit of such claims, and second, to reduce the amount of any moneys outstanding by reason of advances made by the Corporation to the Association pursuant to the Assistance Agreement. *Any additional proceeds shall be transferred to the Association.*" [Emphasis added].

The complaint prepared and filed by the Munger firm seeks $20 million compensatory and $10 million punitive damages. FSLIC alleged in the complaint that

the loans outstanding from FSLIC to FWSLA aggregated only $6,002,705.00 [M.A. Ex. 2, a p. 5]. Thus, aside from attorneys' fees and costs, the Munger firm is seeking a net recovery for FWSLA, a private entity, in the sum of $23,997,295.00, of which $13,997,295.00 purports to be compensatory damages to the private entity.

On these uncontradicted facts, the District Court found that the interest which Moscov represented while General Counsel and now represents as a partner in the Munger firm are the same [Appendix E]. However, that fact, even if true, is not relevant, because the federal conflicts of interest statute, 18 U.S.C. §207(a), does not turn on the similarity or identity of interests represented while in federal service and after leaving the employment of the Government.

The statute simply prohibits a former officer of the Government from knowingly acting:

> "[A]s agent for anyone other than the United States in connection with any judicial or other proceeding . . . in which the United States is a party or has a direct and substantial interest and in which he participated personally and substantially as an officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, while so employed . . ."

There can be no doubt that as the General Counsel for the agency of the Government which signed the complaint, Moscov was an officer within the meaning of the statute. It follows that the role of Moscov's law firm in prosecuting a claim principally for someone "other than the United States", disqualifies Mos-

cov and his law partners from further participation in the litigation on behalf of the Government agency.

The Court of Appeals adopted without hearing or discussion in its decision, the irrelevant findings of the District Court on this question [Appendix A]. Thus, a substantial question of legislative policy affecting every former federal officer of the Executive Branch and the independent agencies has been resolved by the Ninth Circuit against the plain meaning of the statutory language and without full-blown adversary argument on the question in the Court of Appeals.

Conclusion.

This case presents an unusual opportunity for the Court to consider several facets of the important questions of unlawfully obtained evidence in civil actions brought by the Government and disqualification of counsel in such litigation based upon multiple conflicts of interest. For the reasons stated, a writ of certiorari should issue to the Court of Appeals to review the questions presented by this petition.

Respectfully submitted,

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SIMON, SHERIDAN, MURPHY,
THORNTON & MEDENE,
Attorneys for Petitioners.

APPENDIX "A"

Order

APPENDIX "A."

Order.

United States Court of Appeals, for the Ninth Circuit.

Robert C. Fielding, Albert G. Neumeyer, Deceased, Alfons Landa, Clifford Jones, Edward J. Hellmer, Melvin S. Moss, Harry R. Lahr, David Goldwater, Robert C. Sheppard, William W. Francis, Delmar W. Holloman, Harry D. Fletcher, L. Robert Lacour, Paul G. Antony, William G. Rayson, John D. Pulliam, Cyril Bastian, H. Charles Kwasha, Charles H. Finkelstein, and James S. Ryan, Petitioners, v. Federal Savings and Loan Insurance Corporation, a corporation, George D. Webster, John Henry Brebbia, and Honorable Bruce R. Thompson, United States District Judge, Respondents. No. 25965.

Filed: June 12, 1970.

Before: KOELSCH and WRIGHT, Circuit Judges.

The "Petition for Writ of Mandamus or Other Appropriate Relief" is denied and the proceeding is dismissed. In this regard we approve and adopt the findings and conclusions made by Judge Thompson and which appear in suit No. LV-1222, entitled *Fielding, et al. v. Federal Savings and Loan Ins. Corp., et al.*, in the United States District Court for the District of Nevada.

IT IS SO ORDERED.

M. Oliver Koelsch
Eugene A. Wright
United States Circuit Judges

APPENDIX "B."

Order Denying Rehearing.

United States Court of Appeals, for the Ninth Circuit.

Robert C. Fielding, et al., Petitioners, v. Federal Savings and Loan Insurance Corporation, a corporation, George D. Webster, John Henry Brebbia, and Honorable Bruce R. Thompson, United States District Judge, Respondents. No. 25965.

Filed: Aug. 14, 1970.

Before: KOELSCH and WRIGHT, Circuit Judges.

Petitioners, following the summary denial by a panel of this court of their Petition for Writ of Mandamus or Other Appropriate Remedy, filed a Petition for Rehearing containing the suggestion that the matter be considered by the full bench.

The panel did not favor a rehearing by the panel or in banc, and so advised all judges of this court in active service; no judge having requested that a vote be taken on such suggestion,

IT IS ORDERED that the Petition for Rehearing is denied, and the suggestion for in banc consideration is rejected.

APPENDIX "C."

Constitutional, Statutory, and Regulatory Provisions Involved.

THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Conflicts of Interest Law (18 U.S.C. §207 (a)).

Whoever, having been an officer of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent for anyone other than the United States

in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and in which he participated personally and substantially as an officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, while so employed, . . .

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both: *Provided*, That nothing in subsection (a) or (b) prevents a former officer or employee, including a former special Government employee, with outstanding scientific or technological qualifications from acting as attorney or agent or appearing personally in connection with a particular matter in a scientific or technological field if the head of the department or agency concerned with the matter shall make a certification in writing, published in the Federal Register, that the national interest would be served by such action or appearance by the former officer or employee.

Federal Rules of Civil Procedure, Rule 52(a).

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall

not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

Rules of Professional Conduct, California Business and Professions Code following §6068.

Rule 5. A member of the State Bar shall not accept employment adverse to a client or former client, without the consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client.

Rule 6. A member of the State Bar shall not accept professional employment without first disclosing his relation, if any, with the adverse party, and his interest, if any, in the subject matter of the employment.

Rule 7. A member of the State Bar shall not represent conflicting interests, except with the consent of all parties concerned.

APPENDIX "D."

Order.

In the United States District Court, for the District of Nevada.

Federal Savings and Loan Insurance Corporation, a corporation, Plaintiff, v. Robert C. Fielding, et al., Defendants. Civil No. LV-1222.

Filed: May 28, 1970.

On April 1, 1970, twenty defendants filed a Motion for Preliminary Injunction and Restraining Orders and also, on April 13, 1970, filed a Motion for a Protective Order. The latter motion seeks an order restraining plaintiff from conducting any discovery procedures by means of depositions until the ruling on the first motion. Inasmuch as the first motion has been denied, the Motion for a Protective Order falls with it.

The Motion of Twenty Defendants for a Preliminary Injunction and Restraining Orders contains eleven prayers for relief. The first five prayers sought the disqualification of Munger, Tolles, Hills & Rickershauser as plaintiff's attorneys in this case. A hearing was held thereon on April 17, 1970, and the motion involving the first five prayers was denied. On April 29, 1970, the Court's Findings of Fact, Conclusions of Law and Order denying the first five claims for injunctive relief was filed.

Certain preliminary motions in the case came on for hearing before the Court on May 21, 1970, among them the aforementioned Motion for a Protective Order. Meanwhile, memoranda had been filed by counsel relating to the merits of the six remaining claims for

injunctive relief, which sought relief from alleged misconduct of George D. Webster and John Henry Brebbia in the form of advance rulings on the admissibility of evidence over a possible claim of attorney-client privilege and orders prohibiting Webster and Brebbia from divulging or using any information obtained by them, while acting as attorneys for any of the parties defendant herein, for the benefit of plaintiff. Webster and Brebbia are presently the top executive officers of First Western Financial Corporation which owns plaintiff's assignor, First Western Savings and Loan Association.

In the argument on the motion for a protective order, the twenty defendants pressed the necessity for an evidentiary hearing on the motion for injunctive relief against Webster and Brebbia—thus the merits of that motion were necessarily argued and considered.

The Court, deeming itself sufficiently advised on the law and the facts, reached the following conclusions: First, that any claims of privilege arising from an allegedly confidential communication during an attorney-client relationship cannot providently be determined in advance and must await the assertion of the privilege in response to a specific interrogatory in the normal and orderly course of pre-trial and trial proceedings; and second, whether or not the dual relationship occupied by Webster and Brebbia with respect to the parties in interest in this litigation is so meretricious as not to be allowable cannot in any practical way be solved by specific orders attempting to control what use may be made by plaintiff of knowledge and information which they have. The history of litigation between these parties and plaintiff's assignor, which need not be summarized in this order, leads to a con-

clusive presumption that use already has been made of facts and information known to and in the possession of Webster and Brebbia. Whether the over-all relationships among the parties since approximately 1960 is such as to lead a court of equity to conclude that this action with Webster and Brebbia on the side of plaintiff cannot in good conscience be permitted to continue is not one that can be solved by curtailing discovery. On the contrary, the fullest development of the fact is needed for a determination of such an issue. Accordingly, IT HEREBY IS ORDERED:

1. Defendants' motion for an evidentiary hearing on the Motion of Twenty Defendants for Preliminary Injunction and Restraining Orders (last six prayers) is denied.

2. The Motion of Twenty Defendants for Preliminary Injunctions and Restraining Orders (last six prayers) is denied.

3. The motion of twenty defendants for a protective order suspending discovery is denied.

Dated: May 28, 1970.

Bruce R. Thompson
United States District Judge

APPENDIX "E."

Findings of Fact and Conclusions of Law re: Defendants' Motion to Disqualify and Enjoin Plaintiff's Counsel and Order Thereon.

In the United States District Court, for the District of Nevada.

Federal Savings and Loan Insurance Corporation, a corporation, Plaintiff, v. Robert C. Fielding, et al., Defendants. Civil No. LV-1222.

Filed: April 29, 1970.

This cause having duly come on to be heard on April 17, 1970, on motion of twenty defendants[1] to disqualify the law firm of Munger, Tolles, Hills & Rickershauser from continuing as counsel for the plaintiff, Federal Savings and Loan Insurance Corporation, and to enjoin said firm from further participation in this action and from divulging information to plaintiff, and the Court having considered the pleadings in the action, the affidavits presented, the evidence submitted by stipulation and the memoranda of points and authorities, and the Court having offered all parties the opportunity to present further evidence, which offer was declined, and the Court having heard oral argument, and due deliberation having been had thereon,

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[1]The twenty defendants are Robert C. Fielding, Albert G. Neumeyer, Alfons Landa, Clifford A. Jones, Edward J. Hellmer, Melvin S. Moss, Harry R. Lahr, David Goldwater, Robert C. Sheppard, William W. Francis, Delmar W. Holloman, Harry D. Fletcher, Robert L. Lacour, Jr., Paul G. Antony, William G. Rayson, John Donald Pulliam, James S. Ryan, Cyril Bastian, H. Charles Kwasha and Charles H. Finkelstein.

the Court finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. On or about June 6, 1967, there was a meeting at the apartment of Albert Neumeyer attended by attorney Norbert Schlei, three other defendants in the case of *First Western Savings and Loan Association v. Moss*, #A-43922, Eighth Judicial District Court for the State of Nevada and several attorneys and/or third parties. Statements made at said meeting were not confidential communications.

2. Defendants delayed in raising the conflict of interest issue in this Court until on or about March 30, 1970, even though there was substantial litigation in the interim directly involving Neumeyer and other defendants present at the June 6, 1967 meeting. Defendants' failure to assert this issue promptly provides additional circumstantial evidence that statements made on or about June 6, 1967, were not confidential communications.

3. No attorney-client relationship was ever established between attorney Norbert A. Schlei and Albert G. Neumeyer or any other defendant in this action with respect to the case of *First Western Savings & Loan Association v. Moss*, #A-43922 in the Court for the Eighth Judicial District of the State of Nevada, or any other related matter, irrespective of whether statements at the June 6, 1967, meeting were confidential communications.

4. On or about October 21, 1968, with full understanding of the nature and extent of employment of Munger, Tolles, Hills & Rickershauser by the Federal Savings and Loan Insurance Corporation and the dangers and risks to himself inherent in said employment, Mr. Neumeyer freely consented to Munger, Tolles, Hills & Rickershauser acting as attorneys for the Federal Savings and Loan Insurance Corporation in connection with all matters and litigation arising out of the operation of First Western Savings and Loan Association and First Western Financial Corporation, Munger, Tolles, Hills & Rickershauser sought the consent of Mr. Neumeyer as a precautionary measure although it did not believe attorney Schlei had ever represented Mr. Neumeyer.

5. Alan Moscov was General Counsel for the Federal Home Loan Bank Board at the time the case at bar was filed. He is now a partner in the firm of Munger, Tolles, Hills & Rickershauser. The interests Mr. Moscov represented as General Counsel are the same as he is now representing as a member of Munger, Tolles, Hills & Rickershauser with respect to the case at bar.

The foregoing Findings of Fact insofar as they may be considered Conclusions of Law shall be deemed Conclusions of Law.

CONCLUSIONS OF LAW

The following Conclusions of Law, insofar as they may be considered Findings of Fact, are so found by this Court to be true in all respects.

From the foregoing facts the Court concludes:

1. Munger, Tolles, Hills & Rickershauser's current employment as counsel for the Federal Savings and Loan Insurance Corporation in this action is not adverse to any former employment or professional acts of attorneys Norbert A. Schlei or Alan J. Moscov and no conflict of interest arises thereby.

2. Even if it should be assumed that current employment is inconsistent and adverse to any former relationship between attorney Norbert A. Schlei and defendant Albert G. Neumeyer, defendant Neumeyer consented to the employment of Munger, Tolles, Hills & Rickershauser by the plaintiff, the Federal Savings and Loan Insurance Corporation, and knowingly waived any objection he might have to this employment because of any former relationship with attorney Schlei.

3. The firm of Munger, Tolles, Hills & Rickershauser and particularly attorneys Schlei and Moscov have acted in accordance with their professional responsibility and have not violated Canon 6, Canon 36 or Canon 37 of the former Canons of Professional Ethics, or Rules 4-7 of Rules of Professional Conduct for the State Bar of California, *California Business & Professions Code* §6076, or 18 U.S.C. §207, or any other applicable rule of professional conduct.

4. The firm of Munger, Tolles, Hills & Rickershauser is not disqualified from continuing to repre-

sent the plaintiff, the Federal Savings and Loan Insurance Corporation, in this action.

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED, ADJUDGED AND DECREED:

1. That the first five prayers of defendants' motion for injunctions and restraining orders are denied.

2. That defendants shall submit its memorandum of points and authorities in support of the remaining prayers of said motion by May 1, 1970, and plaintiff shall submit its memorandum in opposition by May 15, 1970.

Dated: April 17, 1970.

Bruce R. Thompson
United States District Judge

APPENDIX "F."

Order re Defendants' Motion to Disqualify Plaintiff's Counsel.

In the United States District Court, for the District of Nevada.

Federal Savings and Loan Insurance Corporation, a corporation, Plaintiff, v. Robert C. Fielding, et al., Defendants. LV-1222.

Filed: May 26, 1970.

This cause having duly come on to be heard on April 17, 1970, on motions of twenty defendants for five preliminary injunctions and restraining orders relative to plaintiff's counsel, Munger, Tolles, Hills & Rickershauser, and the court having considered the pleadings, the affidavits, and the evidence admitted at the hearing as well as the argument of counsel, the court after due deliberation advised counsel that he would deny defendants' motions. The court instructed plaintiff's counsel to prepare findings of fact, conclusions of law, and order thereon.

On or about April 24, 1970, plaintiff submitted proposed findings of fact, conclusions of law, and an order thereon.

On May 4, 1970, defendants filed objections to plaintiff's proposed findings of fact, conclusions of law, and order thereon; and defendants submitted proposed findings of fact, conclusions of law, and order thereon.

On May 7, 1970, plaintiff filed objections to defendants' proposed findings of fact, conclusions of law, and order thereon.

The court prior to receiving defendants' objections to plaintiff's proposed findings of fact, conclusions of law, and order thereon signed plaintiff's proposed findings of fact, conclusions of law and order thereon and dated it April 17, 1970; however, said order was filed by the clerk of the court on April 29, 1970, but counsel were not given notice until May 20, 1970, that the court had signed the order. The court has now reviewed the proposed findings of fact, conclusions of law, and orders submitted by the respective parties as well as the objections, and makes the following ruling. Defendants' objections to plaintiff's proposed findings of fact, conclusions of law, and order thereon are overruled and denied. Plaintiff's objections to defendants' proposed findings of fact, conclusions of law, and order thereon are sustained and granted.

Dated: May 26, 1970.

Bruce R. Thompson
United States District Judge

APPENDIX "G."

Order Denying Motions to Dismiss.

309 Federal Supplement 1146.

Federal Savings and Loan Insurance Corporation, a corporation, Plaintiff, v. Robert C. Fielding et al., Defendants. Civ. No. LV-1222.

United States District Court, D. Nevada. Decided Nov. 25, 1969.

Alan J. Moscov, Gen. Counsel, Max Wilfand, Deputy Gen. Counsel, Washington, D. C., and Munger, Tolles, Hills & Rickershauser, Roderick M. Hills, Carla A. Hills and Alan V. Friedman, Frederick B. Warden, Jr., Los Angeles, Cal., and Milton W. Keefer, Las Vegas, Nev., for plaintiff.

Bell & Morris, Las Vegas, Nev., for dendant Lou F. La Porta.

Lloyd D. George, Las Vegas, Nev., for defendant William L. Taylor.

John J. McCune, Reno, Nev., for defendant Walter D. Bradley.

Ross, Snyder, Goodman & Bryan, Las Vegas, Nev., for defendant R. Guild Gray.

George E. Franklin, Jr., Las Vegas, Nev., for defendant Thomas Beam.

Singleton, DeLanoy, Jemison & Reid, Las Vegas, Nev., for defendants Nelson Conway, Kermit Moe, Clarence T. Hibbs, and Conway, Moe & Hibbs, a partnership.

William G. Simon and Thomas R. Sheridan of Simon, Sheridan, Murphy, Thornton & Medvene, Los Angeles, Cal., Clifford A. Jones, of Jones & Jones, Parraguirre, Rose, Pico & Norwood, Ltd., Las Vegas, Nev., for defendants.

THOMPSON, District Judge.

This action is brought by Federal Savings and Loan Insurance Corporation (FSLIC) to enforce rights of action acquired by assignment from First Western Savings and Loan Association (Association).

The rights are asserted in five separately stated causes of action or claims for relief. Plaintiff first alleges a cause of action for damages for a conspiracy on the part of defendants who controlled First Western Financial Corporation to make the Association a wholly owned subsidiary of Financial and artificially to inflate the price of Financial stock by knowingly misrepresenting the true value of the Association through imprudent business manipulations and practices.

The second claim for relief seeks damages for the alleged negligence of certain defendants who allegedly owed a duty of care to the Association because of their status as controlling stockholders, directors or officers.

The third cause of action names two corporations, Nevada Bank of Commerce and American Savings and Loan Association, as defendants and seeks a judgment requiring these defendants to make restitution to plaintiff for assets of the Association which were allegedly unlawfully acquired by these defendants in fraudulent transactions manipulated by persons in the common control of both corporations.

The fourth cause of action asserts claims for relief under Section 10(b) of the Securities Exchange Act

for the fraudulent manipulation of the stock market in connection with sales of the artificially inflated stock of Financial and for deceptive and manipulative practices in the solicitation and procurement of withdrawable accounts of the Association as an integral part of the overall conspiracy and scheme to manage the Association fraudulently and imprudently for the benefit and advantage of the stockholders of the parent corporation, First Western Financial Corporation.

Finally, there is a separately stated cause of action against the firm of certified public accountants retained by the Association, alleging negligence or willful participation in the general conspiracy.

Defendants argue that plaintiff lacks capacity to sue. Plaintiff contends that it has inherent power to sue for damages to an insured, independent of assignment of claims, to fulfill its regulatory function and safeguard the federal treasury. It bases its argument on 12 U.S.C. §1725, which confers upon the plaintiff the power to sue and be sued, and 12 U.S.C. § 1729(f), which allows plaintiff to lend, purchase assets of, or make contributions to an insured institution to prevent default.

The power to sue and be sued in itself does not create jurisdiction. Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 85, 3 L.Ed. 38 (Marshall, C. J.):

> "The plaintiffs contend, that the incorporating act confers this jurisdiction. That act creates the corporation, gives it a capacity to make contracts and to acquire property, and enables it 'to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended,' in courts

> of record, or any other place whatsoever.' This power, if not incident to a corporation, is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear as a corporation, in any court which would, by law, have cognizance of the cause, if brought by individuals. If jurisdiction is given by this clause to the federal courts, it is equally given to all courts having original jurisdiction, and for all sums however small they may be."

Accord, Mullins v. First National Exchange Bank, 275 F.Supp. 712 (W.D. Va. 1967); Bankers Trust Co. v. Texas & Pac. RR Co., 241 U.S. 295, 36 S.Ct. 569, 60 L.Ed. 1010 (1916); C. Wright, Federal Courts 49 & n. 5 (1963); Harris v. American Legion, 162 F.Supp. 700, 710 (S.D.Ind. 1958), aff'd, 261 F.2d 594.

The legislative history, the statutory provisions, and the nature of plaintiff's functional obligations and its administrative purpose all indicate unequivocally that plaintiff has no independent power to sue. It sues, if at all, insofar as injuries to an insured are concerned, only as an assignee or subrogee of its insured. It has no independent right not to be injured by fraud perpetrated upon its insured and therefore it cannot sue in tort under a law of the United States as intended by 28 U.S.C. § 1331.

The precise nature of the entities involved here must be carefully considered. The federal government is, in this case, attempting to regulate the relations of state citizens with a corporation created under a state

charter. Thus, there are involved not only the interest in preserving the dual banking system in the United States but the interest in a proper balance in federal relations vis-a-vis the states. These interests have, in the proper context, constitutional significance. Hopkins Federal Savings & Loan Ass'n v. Cleary, 296 U.S. 315, 338, 56 S.Ct. 235, 80 L.Ed. 251 (1935) (Wisconsin could prohibit a state savings and loan association from converting itself into a federal association as federal law allowed it to do).

The Federal Home Loan Bank Act, H.R. 6021, signed May 28, 1935, 49 Stat. 293, 299, added 12 U.S.C. § 1729(f) to the National Housing Act and it is from this section that plaintiff gleans implied authority to sue here.

H.R. 6021 was submitted to the House on February 21, 1935. H.Rep. 202, 74th Cong. 1st Sess. noted at page 4:

> "Section 21 of the bill amends section 406 of the National Housing Act by the addition of a new subsection (f) so as to permit the [plaintiff] to make loans to or purchase the assets of insured institutions in order to prevent a default or to restore an insured institution to normal operation."

The addition appears at page 10 of the report, as follows:

> "(f) In order to prevent a default in an insured institution or in order to restore an insured institution in default to normal operation as an insured institution, the corporation is authorized in its discretion to make loans to, purchase the assets of, or make a contribution to an insured institution or an insured institution in default."

Plaintiff contends that a suit for damages for injury to its insured is allowed even though the enforcement section of the National Housing Act, now 12 U.S.C. § 1730, limits plaintiff to removal of officers, termination of insurance, cease and desist orders, or, under § 1729, liquidation.

Section 1730 remained the same from the date of the Act until 1966. It provided only for termination of insurance as an enforcement measure. The present section came into being on October 16, 1966, 80 Stat. 1036. The pertinent legislative history appears at 1966 U.S. Code Cong. & Admin. News 3532, 3538 & 3547. The Congressional reports repeatedly emphasized the importance of the division of regulatory power between the national and state governments. The purpose of the enforcement provisions is to quickly stop fraudulent practices, not to affirmatively recover for them.

Cases offered by plaintiff as dispositive on this issue of whether an independent right has been conferred by federal law are easily distinguished. Either they involve a federal savings and loan so that a federal right existed by reason of direct fraud on a federal corporation, there was a take-over by a federal agency pursuant to law or agreement, or there was an assignment, and the opinion did not distinguish between jurisdiction under 28 U.S.C. § 1331 and special jurisdiction conferred as discussed *infra* for a suit by a federal corporation. Federal Savings and Loan Insurance Corporation v. Third National Bank, 153 F.2d 678 (6th Cir. 1946), cert. den. 329 U.S. 718, 67 S.Ct. 49, 91 L.Ed 622 (assignment from federal savings and loan); United States v. LeMay, 322 F.2d 100 (5th Cir. 1963) (take-over); Mason v. Kavy, 134 F.Supp. 451

(E.D.N.Y. 1955) (take-over). Equitable jurisdiction must also be distinguished. While a federal agency may have an independent right at equity, Reich v. Webb, 336 F.2d 153 (9th Cir. 1964), cert. den. 380 U.S. 915, 85 S.Ct. 890, 13 L.Ed.2d 800; Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 80 S.Ct. 332, 4 L. Ed.2d 323 (1959), equitable jurisdiction does not confer the right to hold another substantively liable. *Reich, supra*, 336 F.2d at 157: "Basically the holding stands for nothing more than a declaration that substantive liability cannot be created by the Bank Board apart from statute, a proposition with which we fully agree."

Nevertheless, plaintiff may properly maintain this action and does have capacity to sue under the provisions of 12 U.S.C. §1730(k), as amended in 1966, and the assignment.

12 U.S.C. § 1730(k) states:

"Jurisdiction and enforcement

"(k) (1) Notwithstanding any other provision of law, (A) the Corporation shall be deemed to be an agency of the United States within the meaning of section 451 of Title 28; (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district and division embracing the place where the same is pending by following any procedure for removal now or here-

> after in effect: *Provided*, That any action, suit or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before final judgment in any action, suit, or proceeding in any court of any State or of the United States or any territory, or any other court."

It is apparent that Congress intended that this Court would have jurisdiction in this action if plaintiff does not fall within the proviso limiting federal question jurisdiction. It does not. The plaintiff is not suing as the "conservator, receiver, or other legal custodian" of the insured state-chartered institution.

Plaintiff here first became involved, for the purposes of this case, with First Western Savings and Loan Association when it entered into an agreement dated June 21, 1961, to insure the withdrawable accounts of the Association. On December 19, 1966, because the Association had suffered financial reverses and the danger of a default was imminent, plaintiff entered into an assistance agreement pursuant to which plaintiff has loaned to the Association some $6,000,000. The assistance agreement provided certain procedures and requirements for the security of plaintiff, among them being the right to approve members of the Association Board of Directors. In September, 1968, for the further

security of plaintiff, the Association executed an assignment to plaintiff.[1]

Defendants argue that the assignment is invalid under Nevada law, citing Gruber v. Baker, 20 Nev. 453, 23 P. 858, 9 L.R.A. 302 (1890), for the proposition that a chose in action for fraud cannot be assigned. Whether Gruber v. Baker expresses the current Nevada law under the facts of this case is irrelevant because the validity of the assignment by the Association to plaintiff is controlled by federal, not by state, law. The federal right under 12 U.S.C. § 1729 (f) to purchase assets of a state-chartered insured savings and loan company requires the application of federal law to determine the transferability of the assets. In FDIC v. Rectenwall, 97 F.Supp. 273 (N.D.Ind. 1951), on facts and statutes for practical purposes indistinguishable from those here involved, the Court applied federal law and held tort claims assignable although state law would not allow it. An assignment to FDIC of a claim by a bank against an embezzler was upheld in Brown v. New York Life Ins. Co., 152 F.2d 246 (9th Cir. 1945). Federal courts must fashion fed-

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[1]The assignment transferred:

"[A]ny and all claims [the Association] may possess against any officers, employees, or directors of the Association or of First Western Financial Corporation ('Financial'). Financial, any shareholders of Financial, any persons or parties acting as consultants or advisors to the Association or Financial and any other persons or parties acting with or on behalf of the foregoing that arise out of transactions occurring prior to December 1, 1966, including all such claims encompassed in Case No. A-43922 [now pending in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark] and all such claims arising by reason of transactions by persons or parties in the stock of Financial."

eral law to further the purposes of the National Housing Act and to give effect to the regulatory scheme. United States v. View Crest Garden Apartments, Inc., 268 F.2d 380 (9th Cir. 1959). Cf. Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957). It is reasonably necessary, it seems to us, that the powers granted FSLIC by the National Housing Act to insure withdrawable accounts, lend money to prevent insolvency and default, purchase assets of an insured institution and otherwise to protect the depositors and its own position as insurer be construed impliedly to support the acceptance of an assignment of assets to secure repayment of loans made. The assignment is valid. This Court has jurisdiction under 12 U.S.C. § 1730(k)(1) of the actions brought on claims validly assigned to plaintiff by the Association.

Finally, we must consider the more elusive problems presented by the fourth claim for relief. Here the defendants named in paragraph 10 of the Complaint are alleged to have violated Section 10(b) of the 1934 Securities Exchange Act, 15 U.S.C. § 78j(b) and Rule 10b-5 adopted by the Securities Exchange Commission in 1942, 17 CFR § 240.10b-5, which proscribe fraud and deception in connection with the purchase or sale of a security by use of instrumentalities of interstate commerce or of the mails.

Incontestibly, this Court has subject matter jurisdiction of such a claim for relief. Section 78aa, Title 15, United States Code, provides:

> "The district courts of the United States, and the United States courts of any Territory or other

> place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. * * *."

The issue is whether an actionable claim has been stated in favor of plaintiff or plaintiff's assignor. In summary, the Complaint charges that the paragraph ten defendants conspired fraudulently to inflate the value of First Western Financial Corporation stock (of which they own 81%) by regularly and intentionally overstating the income, assets and concealing liabilities of the Association (its wholly owned subsidiary) by the use of the mails, statements filed with the Securities Exchange Commission and proxy statements sent to shareholders and unjustly enriched themselves by sales of their personally owned Financial stock, the price of which had been so fraudulently and artificially inflated. The Complaint also charges like deceptive

statements in mailings to Association's depositors and prospective depositors, inducing the fraudulent procurement of withdrawable deposit accounts. Plaintiff claims the withdrawable accounts, evidenced by deposit books or investment certificates, to be "securities" within the Securities Exchange Act.

With respect to the sales of Financial stock by the paragraph ten defendants, it is apparent that the Complaint cannot sustain a judgment for damages at law for tortious misconduct in violation of Rule 10b-5. The cases have quite uniformly held that the plaintiff must be either a buyer or seller who has been deceived to his detriment by one who bought from or sold to him. Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2nd Cir. 1952); Mutual Shares Corp. v. Genesco, Inc., 384 F.2d 540 (2nd Cir. 1967). Plaintiff and plaintiff's assignor were not buyers or sellers of Financial stock.

We cannot, however, ignore the broad statutory grant of equitable jurisdiction to the district courts to secure compliance with the regulations. This has been relied upon to justify relief in many cases where the plaintiff was neither a buyer nor a seller. Ruckle v. Roto American Corp., 339 F.2d 24 (2nd Cir. 1964); Symington Wayne Corp. v. Dresser Industries, Inc., 383 F.2d 840 (2nd Cir. 1967); Mutual Shares v. Genesco, Inc., *supra*. In discussing a similar unrestricted grant of equitable jurisdiction under the Fair Labor Standards Act, the Supreme Court has said (Mitchell v. Robert DeMario Jewelry, 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960)):

> "We initially consider § 17 apart from the effect of its proviso, which was added in 1949.

The court below took as the touchstone for decision the principle that to be upheld the jurisdiction here contested 'must be expressly conferred by an act of Congress or be necessarily implied from a congressional enactment.' 260 F.2d (929), at 933. In this the court was mistaken. The proper criterion is that laid down in Porter v. Warner Holding Co., 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332. This Court there dealt with an action brought by the Price Administrator under the Emergency Price Control Act of 1942, 50 U.S.C.A. Appendix, § 925, to enjoin the collection of excessive rents and to require the landlord to reimburse its tenants for moneys paid as a result of past violations. We upheld the implied power to order reimbursement, in language of the greatest relevance here:

" 'Thus the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act. Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. * * * [T]he court may go beyond the matters immediately underlying its equitable jurisdiction * * * and give whatever other relief may be necessary under the circumstances. * * *

> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." Brown v. Swann, 10 Pet. 497, 503, 9 L.Ed. 508. * * *' 328 U.S., at 397-398, 66 S.Ct. at page 1089."

In the *Mitchell* case, the Court authorized mandatory injunctive relief to provide restitution of lost wages unjustly retained by defendants. It may be suggested that enforcement of the Securities Exchange Act, like the Fair Labor Standards Act, purposes to vindicate public rather than private rights even though private restitution is the remedy employed. Wirtz v. Malthor, 391 F.2d 1 (9th Cir. 1968); Wirtz v. Milton J. Wershow Co., 416 F.2d 1071, 9th Cir. 1969.

Analogously, in Janigan v. Taylor, 344 F.2d 781 (1st Cir. 1965), the theory of unjust enrichment was applied to require a defrauding buyer of stock in violation of Rule 10b-5 to disgorge his profits to the seller which might be greatly in excess of the seller's actual damages and this despite a statutory prohibition of a recovery in excess of actual damages. 15 U.S.C. § 78bb. Cf. Myzel v. Fields, 386 F.2d 718 (8th Cir. 1967). Thus, the broad reach of equitable relief under the Securities Exchange Act was recognized.

The fraud and deception in the sale of securities had concomitantly a direct impact on the Association

through the alleged over-solicitation of withdrawable accounts and imprudent investment of surplus funds (direct damage being suffered by excessive interest obligations to depositors and losses from bad loans and over-valued securities) and a direct benefit to the paragraph ten defendants who gained in the inflated sales price of Financial stock resulting from use of the over-stated financial health of the Association. Accepting as well-reasoned and sound the distinction made in Superintendent of Insurance of State of New York v. Bankers Life & Casualty Co., 300 F.Supp. 1083 (S.D.N.Y. 1969), between the employment of fraud in connection with a security transaction and the effectuation of a security transaction in connection with a fraudulent activity, we think the allegations of the Complaint cast the transactions in both categories and thus allege a "federal fraud", that is to say, that the Association was damaged by fraud and deception employed in connection with the purchase and sale of the capital stock of Financial. Inasmuch as the damage to the Association was allegedly one intended consequence of the entire scheme, as was the unjust enrichment of defendants, proximate cause is not difficult to find. The Court, in the *Bankers Life* case, *supra*, had occasion to describe the characteristics of a "federal fraud" under the Securities Exchange Act in the following way:

> "The securities acts, and especially the 1934 Act, were intended to prevent fraud and deception, manipulation and inadequate disclosure in the dissemination and trading of securities. The securities acts are not so much concerned with fraud per se as with the effect of fraud upon investors

and the public interest in maintaining free and open securities markets. 1934 Act § 2(3), 15 U.S.C. § 78b(3); Shoenbaum v. Firstbrook, 405 F.2d 200, 212 (2d Cir.), rev'd en banc, 405 F.2d 215 (2d Cir. 1968); S. E. C. v. Texas Gulf Sulphur Co., 401 F.2d 833, 858-860 (2d Cir., en banc, 1968); cf. A. T. Brod & Co. v. Perlow, supra.

"In order to sustain a complaint alleging fraud under section 10(b) of the 1934 Act, it must appear with reasonable clarity from the face of the complaint either (1) that a purchase or sale of securities is at the crux of a fraudulent scheme; or (2) that inducing a purchase or sale of securities is the object of a fraudulent scheme; or (3) that fraudulent statements, misstatements, or omissions are made in a manner which is reasonably calculated to influence the investing public, or are of the sort which the reasonable investing public might rely upon; or (4) that the trading process is abused through potential market manipulation or the spread of watered stock.

"The purity of the security transaction and the purity of the trading process are the sole objectives of federal concern. Therefore, the consummation of a security transaction as a mere incident of a fraudulent scheme and the mere fact of injury caused by the fraud, in the absence of any possibility that the fraud might materially affect the purity of the security transaction and the purity of the trading process would not make the fraud federally cognizable. Cf. O'Neill v. Maytag, 230 F.Supp. 235, 239 (S.D.N.Y.), aff'd, 339 F.2d 764 (2d Cir. 1964)."

The fraud alleged in this Complaint carries all the earmarks and brands suggested. Cf. A. T. Brod & Co. v. Perlow, 375 F.2d 393 (2nd Cir. 1967); Carroll v. First National Bank of Lincolnwood, 413 F.2d 353 (7th Cir. 1969).

This is a complicated case which is in its initial pleading stages. We are deciding only a question of the Court's jurisdiction to entertain the claim of alleged fraudulent and deceptive practices in violation of the Securities Exchange Act. Neither plaintiff nor its assignor was a defrauded buyer or seller and under the precedents cited to the Court, neither may sue for damages. But a party need not be a buyer or seller to have standing to sue for equitable relief and mandated restitution is a possible form of relief under the case made by the Complaint. The possibility may be remote, but this is of no concern when the attack is on the jurisdiction of the Court. "In these circumstances, there is no reason to emasculate the securities laws by forbidding remedies which might prove to be essential." SEC v. National Securities, Inc., 393 U.S. 453, 463, 89 S.Ct. 564, 570, 21 L.Ed.2d 668 (1969).

We do not reject, but do not consider, plaintiff's further contention that fraud in the solicitation of the withdrawable accounts alone vests jurisdiction under the Securities Exchange Act inasmuch as the accounts are "securities." See Tcherepnin v. Knight, 389 U.S. 332, 88 S. Ct. 548, 19 L.Ed.2d 564 (1967).

It hereby is ordered that the motions to dismiss be, and they hereby are, denied and each defendant is granted twenty (20) days from date in which to serve and file an answer to the Complaint.

APPENDIX "H."

Motion for Preliminary Injunctions and Restraining Orders.

In the United States District Court, for the District of Nevada.

Federal Savings and Loan Insurance Corporation, a corporation, Plaintiff, v. Robert C. Fielding, et al., Defendants. LV-1222.

Defendants Fielding, Neumeyer, Landa, Jones, Hellmer, Moss, Lahr, Goldwater, Sheppard, Francis, Holloman, Fletcher, Lacour, Antony, Rayson, Pulliam, Ryan, Bastian, Kwasha, and Finkelstein move the Court for preliminary injunctions and orders restraining plaintiff FSLIC, plaintiff's counsel, Munger, Tolles, Hills & Rickershauser, George D. Webster, and John Henry Brebbia in the above entitled cause as follows:

1. An order restraining and enjoining the plaintiff, FSLIC, from further prosecution or taking any further proceedings in the above entitled action so long as Munger, Tolles, Hills & Rickershauser are the attorneys for FSLIC.

2. An order disqualifying, restraining, and enjoining Munger, Tolles, Hills & Rickershauser from acting as attorneys and representing plaintiff, FSLIC, in this action.

3. An order restraining and enjoining, Munger, Tolles, Hills & Rickershauser from doing anything that will injuriously affect the interest of these moving defendants, with particular reference to those defendants or their attorneys who met with Norbert A. Schlei on or about June 6, 1967.

4. An order restraining and enjoining plaintiff, FSLIC, from using any information in this action against these defendants, which information plaintiff obtained and acquired through Munger, Tolles, Hills & Rickershauser, and which information Munger, Tolles, Hills & Rickershauser acquired as a result of Norbert A. Schlei's former relationship as attorney for defendant Neumeyer.

5. An order restraining and enjoining Munger, Tolles, Hills & Rickershauser from divulging any confidential and privileged information to plaintiff, FSLIC, which information was acquired by Munger, Tolles, Hills & Rickershauser while Norbert A. Schlei was acting as attorney for defendant Neumeyer.

6. An order restraining and enjoining George D. Webster from doing anything that will injuriously affect the interest of these defendants.

7. An order restraining and enjoining FSLIC from using any information in this action against these defendants, which information plaintiff obtained and acquired through George D. Webster and which information George D. Webster acquired as a result of his former relationship as attorney for these defendants and for First Western Financial Corporation and First Western Savings and Loan Association.

8. An order restraining and enjoining George D. Webster from divulging any confidential and privileged information to plaintiff, FSLIC, which information was acquired by George D. Webster while he was acting as attorney for these defendants and for First Western Financial Corporation and for First Western Savings and Loan Association.

9. An order restraining and enjoining John Henry Brebbia from doing anything that will injuriously affect the interest of these defendants.

10. An order restraining and enjoining FSLIC from using any information in this action against these defendants, which information plaintiff obtained and acquired through John Henry Brebbia, and which information John Henry Brebbia acquired as a result of his former relationship as attorney for these defendants and for First Western Financial Corporation and First Western Savings and Loan Association.

11. An order restraining and enjoining John Henry Brebbia from divulging any confidential and privileged information to plaintiff, FSLIC, which information was acquired by John Henry Brebbia while he was acting as attorney for these defendants and for First Western Financial Corporation and for First Western Savings and Loan Association.

It is apparent that unless these restraining orders and injunctions are granted by order of this Court, the defendants will suffer immediate and irreparable injury, loss, and damage for which said defendants have no adequate remedy at law.

Dated: March 30, 1970.

Simon, Sheridan, Murphy, Thornton & Medvene
Suite 720
533 Fremont Avenue
Los Angeles, California 90017

Jones, Jones, Close, Bilbray & Kaufman, Ltd.
Suite 620
302 East Carson Avenue
Las Vegas, Nevada 89101
By Thomas R. Sheridan
Thomas R. Sheridan

APPENDIX "I."

Law Offices
MUNGER, TOLLES, HILLS &
RICKERSHAUSER
Eleventh Floor
606 South Hill Street
Los Angeles, California 90014
Madison 6-1491
Area Code 213

Of Counsel
Charles T. Munger
Norbert A. Schlei
Cable Address
Muntoll

June 7, 1967

E. Leroy Tolles
Roderick M. Hills
Charles E. Rickershauser, Jr.
Richard D. Esbenshade
Christian E. Markey, Jr.
Frederick B. Warder, Jr.
James N. Adler
William J. Bird

Mr. A. G. Neumeyer
405 N. Bedford Drive
Beverly Hills, California

Dear Al:

Enclosed herewith is the copy of the complaint you gave me yesterday. I have made a xerox copy for my files.

It seems to me essential that in the discovery proceedings which are conducted in this matter, close attention be paid to the development of your defense that you did not participate in the matters of which the plaintiff complains. In this regard, I think it will be essential to file written interrogatories addressed to the plaintiff corporation as well as to take the depositions of the three individuals involved. Both the interrogatories and the depositions should attempt to pin down as precisely as possible what the contentions of the plaintiff are, not only as to what they claim was done that was wrong, but when it was done, who participated in it, and how each of the defendants is alleged to have participated. If this is done right, there might be some chance that you could get out of the action at an early stage on a motion for summary judgment.

I think you should write to Galane and tell him that you would like close attention to be paid, throughout the discovery proceedings, to the development of your defense that you were not a participant in any of the activities that are alleged to have been wrongful. There is no reason why he cannot do this while developing at the same time the defense that nothing wrongful was done by anyone. However, if you have any doubt that Galane will watch out for your interests in this regard, it might be worthwhile to have someone representing you alone (1) look over the defendants' interrogatories before they are filed and (2) attend the principal depositions. Your representative would not necessarily have to make an appearance in the action or ask questions himself; he could simply make sure that defendants' counsel are reminded to ask the questions that your interests require be asked.

Since I gather that you have confidence in Galane, it probably is not necessary for you to have separate counsel, at least at this stage. However, I would suggest that you take the precaution of giving him written instructions as to the development of any defenses you might have that the others do not have. Although you intend to side with the defendants across the board even if separate defenses on your part can be established, there is no reason why your separate defenses should not be developed as aggressively as all other defenses.

If there is any way that I can be helpful as this matter progresses, I hope you will not hesitate to let me know.

All best regards.

Sincerely,

/s/ Norbert A. Schlei
Norbert A. Schlei

NAS/cr
Enclosure

APPENDIX "J."

Affidavit of Norbert A. Schlei.

In the United States District Court, for the District of Nevada,

Federal Savings and Loan Insurance Corporation, a corporation, Plaintiff, vs. Robert C. Fielding, et al., Defendants. Civil No. L.V. 1222.

State of California, County of Los Angeles—ss.

NORBERT A. SCHLEI, being duly sworn, deposes and says as follows:

1. I am an attorney duly admitted to practice in the States of California and Ohio and in the District of Columbia. I am filing this affidavit with respect to Plaintiff's Motion to Dismiss Defendants' Motion for Preliminary Injunctions and Restraining Orders. The facts set forth herein are within my personal knowledge and if sworn as a witness I can testify competently thereto.

2. I am pleased to acknowledge the personal relationship with Mr. Albert G. Neumeyer mentioned by him in his affidavit. I did indeed serve for some years on the Advisory Committee of the Neumeyer Foundation and have considered Mr. Neumeyer a personal friend of mine for at least six years.

3. On or about June 5, 1967, Mr. Neumeyer telephoned me at my office and asked whether I could attend a meeting to be held at his apartment on June 6, 1967. He said that a lawsuit had been brought in Nevada in which he was one of the defendants, and he wanted to discuss with me whether he should be separately represented and whether, if he ought to be sep-

ately represented, I would be willing to undertake the assignment. He explained that while he was confident there was no merit in the lawsuit, his situation was different from that of the other defendants in that they, at least, had participated in the events involved in the suit whereas he simply was not involved in the events at all, whether wrongful or not. He was quite willing, he said, to participate financially and otherwise in a joint defense, since he believed the other defendants were innocent of any wrongdoing and deserved support; his concern, he said, was simply that his own non-participation be adequately stressed and effectively presented. I agreed to attend the meeting.

4. On June 6, 1967, I attended the meeting, at which there were present the persons whose names are listed in the affidavit of David Brady except for Clifford Jones, who to the best of my recollection was not present. There was discussion at the meeting of the broad issues of policy presented by the case as the defendants saw it, and a highly superficial review of the Complaint consisting of fragmentary references between parties familiar with the facts, incomprehensible to an outsider like myself, and general statements of an exculpatory nature. With the possible exception of a discussion of the attitude to be taken toward attempts to gain personal jurisdiction over one of the defendants in the Nevada case then pending (a matter not involved in any way in the federal case now pending) nothing was said that by the furthest stretch of the imagination could be characterized as confidential. If the defendants' adversaries had overheard the entire meeting, they would have learned only that the defendants considered the suit so totally lacking in merit as to be a sort

of strike suit; that the incidents alleged in the Complaint involved no wrongdoing and were not participated in at all by some defendants, and that the defendants proposed to resist the action with all possible vigor.

5. After the meeting Mrs. Neumeyer joined the group and cocktails were served. Mr. Neumeyer and I had an opportunity to discuss briefly the questions he had raised before the meeting, and he said he had decided that no separate representation would be necessary at that time, although as the matter progressed he might wish to reconsider the question. Meanwhile, he would simply join with the other defendants and be represented by Messrs. Galane and Wines.

6. The following day, it occurred to me that I might usefully write Mr. Neumeyer a letter. Although it had been determined that I was not to be retained in the case, I felt a certain amount of responsibility and, further, felt that I might be retained at a later time. In any case, it seemed to me that Mr. Neumeyer's purposes would be well served if he wrote to Galane and Wines and put in writing his concern about the development of his particular perspective on the case, and also, I wanted to suggest to him the circumstances under which it would be a good idea to reconsider the question of separate or additional representation. Accordingly, I dictated and sent the letter a copy of which is attached to Mr. Neumeyer's affidavit.

7. My interpretation at the time of what had occurred with Mr. Neumeyer was that I had been asked to spend some time with him in order to determine whether I should be retained to perform services as an attorney. Since the decision was not to retain me, I considered that I had performed no services and did not present a bill.

8. Mr. Neumeyer's affidavit (paragraph 8) attributes to me statements which were actually his statements, with which, in reliance on the facts he asserted, I did not disagree. I did state that damage is an essential element of a cause of action sounding in tort.

9. At the time of my meeting with Mr. Neumeyer I was not a member of the firm of Munger, Tolles, Hills & Rickershauser. I was "of counsel" to the firm, which meant that I shared space and facilities with the firm on a reimbursable basis, and was associated with the firm from time to time by agreement on various specific legal matters. However, on January 1, 1968, I did become a partner in the firm.

10. Subsequently, I received a routine memorandum circulated throughout the firm with a view to uncovering possible conflicts of interest relating to the firm's employment by the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation in this matter. I immediately advised Mr. Hills of my prior connection with this matter. (I advised him that I had written a letter to Mr. Neumeyer and explained its contents, but did not show the letter to him since it was packed away with my separate files.) Mr. Hills reviewed the problem with the Board and in due course asked me to contact Mr. Neumeyer and ask whether he would object to the firm's accepting employment that might put it in an adversary position as to him. Mr. Hills explained fully the nature of the proposed employment so that I might express it accurately to Mr. Neumeyer.

11. On October 21, 1968, I telephoned Mr. Neumeyer and discussed the problem with him. I stated that the firm, specifically Mr. Hills, had been asked to

review the whole situation involving himself, First Western Financial and First Western Savings and Loan Association, and make a recommendation as to what should be done. If the firm's recommendation should be that nothing further ought to be done, that presumably would be the end of the matter; however, if the firm's recommendation should be that the pending litigation ought to be continued or other litigation instituted, the firm would undoubtedly be asked to handle such litigation and, of course, would want to be free to do so if it took the engagement at all. I said to Mr. Neumeyer that I was not at all certain a conflict of interest existed since at the time of our previous relationship, I was not a member of the firm, and furthermore, was never actually retained by Mr. Neumeyer with respect to the subject matter. I went on to say, however, that I did not want the firm to become involved in this matter if he would find its involvement objectionable. I told him that the work would be done by various other partners and associates, and I would not participate or know anything about it. Mr. Neumeyer said it sounded to him as if he could only benefit from the fact that a firm having a friend of his in it would be entering the situation. I said my presence in the firm would have no effect one way or the other, since I would not be participating in any way, but said that it did seem to me it would not prejudice him if the matter were handled by Munger, Tolles, Hills & Rickershauser rather than by some other firm. He agreed, saying I could tell the firm that it should feel free to go ahead and would encounter no objections from him based on my prior involvement.

12. It was several days later before I had an opportunity to report to Mr. Hills on my conversation

with Mr. Neumeyer. When we spoke, Mr. Hills asked me whether I had made it clear to Mr. Neumeyer that the firm might be involved in litigation adverse to him. I said I had made that aspect of the matter quite clear. Mr. Hills asked whether I would be willing to send a letter to Mr. Neumeyer confirming his waiver of any objection to the firm's proceeding. I said that I would be willing to do so if he or the Board's counsel felt it was essential, but would prefer not to do so since Mr. Neumeyer might find it insulting for me to write to him in a formal way about a subject on which we had on the telephone arrived at such a clear understanding.

13. In the course of my telephone conversation with Mr. Neumeyer, he did mention that it was desired to arrange a meeting between Mr. Hills and Mr. Fielding. I said that I would be happy to arrange such a meeting if he would tell me where and when Fielding would be available. I subsequently mentioned the matter to Mr. Hills. He said that such a meeting had been mentioned to him by counsel for Fielding, and Hills had advised that he would be glad to make himself available. Neither Mr. Hills nor Mr. Neumeyer ever mentioned the matter to me again and the meeting which took place later between Fielding and Hills was arranged without any participation on my part.

14. I undoubtedly did convey to Mr. Neumeyer that Mr. Hills' role, at least initially, would be to review the matter impartially and formulate a recommendation as to what should be done from a litigation standpoint. However, I expressly stated that the firm would have to be free to handle litigation against Mr. Neumeyer, and his waiver would have to extend

to that eventuality, or the firm would not take the engagement. Mr. Neumeyer waived any objection he might have on conflict of interest grounds against the firm's representation of the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation in any controversy, specifically including litigation involving the subject matter about which Mr. Neumeyer consulted me in June of 1967.

15. So far as the parties other than Mr. Neumeyer are concerned—those who attended or were represented at the June 1967 meeting—I have the following to say:

(a) I have never represented or had any relationship with any of them. (At the June meeting, my stance with respect to them was adverse.)

(b) I have never known anything confidential about them or their affairs.

(c) Except as stated in this affidavit, I have never communicated anything about those defendants or their affairs to anyone.

(d) I have never participated in any way in any matter or litigation involving those parties, and know nothing about the case against them.

16. As I understand the present controversy, it is not contended that any confidential information about the defendants has actually been used against them to their prejudice. The objection purports, rather, to be against the "appearance of evil" involved in my having been affiliated in the past with one side of the case and now being a member of a firm which is on the other side. That being so, I do not intend to permit this firm's client to be prejudiced by any consideration personal to me. If it appears that my continued

membership in this firm might require that client, at this stage of the case, to seek other counsel, I will resign from the firm and thereby remove the asserted basis for objection.

/s/ Norbert A. Schlei
NORBERT A. SCHLEI

Subscribed and sworn to before me this 2nd day of April, 1970.

.....
Notary Public in and for
said County and State.

[Seal]

APPENDIX "K."

Affidavit of Albert G. Neumeyer.

State of California, County of Los Angeles—ss.

ALBERT G. NEUMEYER being duly sworn, deposes and says:

1. That he is a defendant in this action, and that he is also a defendant in the action filed in the Eighth Judicial District Court of Nevada in and for the County of Clark, No. A-43922.

2. That for at least several years prior to January of 1967 a personal relationship existed between Attorney at Law Norbert A. Schlei and affiant. Affiant had established the Neumeyer Foundation for charitable purposes, and Mr. Schlei has served on the Advisory Committee of the Neumeyer Foundation for some four or five years. On several occasions affiant sought advice from Mr. Schlei relative to Foundation matters. When Mr. Schlei was with the United States Department of Justice, affiant spoke with him about the *Baker* case and sought to ascertain if there was any interest in proceeding against affiant. Mr. Schlei advised Mr. Neumeyer that there was no such interest.

3. On May 23, 1967, First Western Savings and Loan Association filed a lawsuit in Clark County, Nevada, No. A-43922, against Messrs. Moss, Neumeyer, Fielding, Hellmer, Pulliam, and Rayson, and twenty Does in which it was alleged that the defendants were guilty of waste and mismanagement to the extent of $20,776,000.00.

4. In approximately the first week of June, 1967, arrangements were made by the defendants and their

attorneys to have a strategy meeting relative to the lawsuit that had just been filed. On June 6, 1967, in the apartment of affiant in the Beverly Wilshire Hotel, Beverly Hills, California, the scheduled meeting took place.

5. Mr. Schlei, in his capacity as an attorney at law, was invited to attend said meeting as counsel for affiant.

6. On June 6, 1967, the scheduled meeting of some defendants and attorneys was held. At least four individual defendants were present at the meeting, as well as counsel from New York, New York, Las Vegas, Nevada, Beverly Hills, California, and Mr. Schlei of Munger, Tolles, Hills & Richershauser. The meeting took a number of hours and was essentially a round-table discussion of defense strategy in Case A-43922. Mr. Schlei actively participated in the discussions with the defendants and co-counsel regarding the merit or lack of merit in the plaintiff's case, the jurisdiction over the persons of some of the defendants, the functions of various counsel, and the overall defense strategy. The complaint was analyzed paragraph by paragraph. At the conclusion of the meeting in the late afternoon when Mr. Schlei left, he took with him a copy of the complaint in Case A-43922.

7. On June 7, 1967, Mr. Schlei wrote a two-page letter to affiant in which he returned the copy of the complaint and advised that he had made a copy of the complaint for his files. Mr. Schlei also discussed in this letter discovery proceedings, interrogatories to the plaintiff corporation, depositions "of the three individuals involved," and summary judgment. He recommended certain communications to other counsel involved in the litigation and noted: "Although you intend to side

with the defendants across the board even if separate defenses on your part can be established, there is no reason why your separate defense should not be developed as aggressively as all other defenses." (A copy of said letter from Mr. Schlei on the letterhead of Munger, Tolles, Hills & Rickershauser is attached to this affidavit as Exhibit A.)

8. Shortly after the June 6, 1967, meeting, Mr. Schlei personally advised affiant that he thought the entire case was ridiculous and that there was no cause of action; he further advised that even if everything pleaded in the complaint were true so long as affiant didn't put money in his pocket there was no cause of action aganist him. Further, Mr. Schlei told affiant that "they might find bad judgment, but not negligence to the point where they can get any money back."

9. A short time prior to the meeting between Mr. Fielding and Mr. Hills which was held on October 30, 1968, Mr. Schlei telephoned affiant and advised him that he was now a member of the law firm of Munger, Tolles, Hills & Rickershauser. Mr. Schlei further advised affiant that Mr. Schlei's partner, Roderick M. Hills, had the opportunity to secure a case from the Federal Home Loan Bank Board relative to First Western Savings and Loan Association. Affiant asked Mr. Schlei as to the nature of Mr. Hills duties and Mr. Schlei advised that Mr. Hills was to review the situation regarding First Western Savings and Loan Association in order to ascertain if there was any cause of action contained therein. Mr. Schlei asked affiant if affiant had any objection to Mr. Hills undertaking such an assignment and affiant responded that he had no objection because he did not foresee that whatever

Mr. Hills was to do would interfere with the pending litigation.

10. Affiant believes he was duped by Mr. Schlei. Affiant was led to believe that Mr. Hills was to look over the matter in the role of an arbiter. Affiant did not understand nor did Mr. Schlei inform him that Mr. Hills was to act in the role of counsel for the Federal Home Loan Bank Board against affiant and any of the other defendants in the pending action.

11. Affiant requested Mr. Schlei to arrange a meeting between Mr. Robert Fielding and Mr. Hills on the basis that Mr. Fielding was in a position to furnish Mr. Hills with information regarding the activities of First Western Savings and Loan Association.

12. The meeting between Mr. Fielding and Mr. Hills took place in New York, New York, on October 30, 1968. The complaint in LV-1222 was filed by the law firm of Munger, Tolles, Hills & Rickershauser on November 12, 1968. Because of the voluminous nature of the aforementioned complaint, affiant is of the belief that it had been substantially prepared prior to the time of the meeting between Mr. Fielding and Mr. Hills. When affiant received a report from Mr. Fielding concerning the meeting which Mr. Fielding had with Mr. Hills, affiant was of the belief that he had been misled by Mr. Schlei.

13. Affiant authorized the sending of the letter dated February 13, 1970, by his trial counsel to Munger, Tolles, Hills & Rickershauser regarding the matter of conflict of interest. Affiant has also reviewed the letter addressed to his trial counsel dated March 17, 1970, by Mr. Hills, and notes on page four thereof that Mr. Hills states that the conversation in question be-

tween affiant and Mr. Schlei took place on October 21, 1968, "several weeks after the assignment of the state case from First Western Savings and Loan Association to the Federal Savings and Loan Insurance Corporation." To the best of my recollection and belief, Mr. Schlei did not advise me of this assignment.

14. Affiant told Mr. Schlei that he had no objection to Mr. Hills so acting because at the time Mr. Schlei called him regarding this matter, affiant, with the understanding that Mr. Hills was to be in the role of an arbiter, and mindful of the evaluation of the state action, A-43922, given to him by Mr. Schlei as set forth heretofore, was led to believe that an impartial and objective evaluation was to be made by Mr. Hills and that such action could very well have dissipated the allegations made in A-43922.

15. Affiant states that there was no mention in any conversation between affiant and Mr. Schlei regarding objections to the proposed course of action by Mr. Hills on the part of other defendants who were present at, or represented in, the meeting in affiant's apartment on June 6, 1967, at which Mr. Schlei was present.

16. At no time did Mr. Schlei advise affiant that Mr. Schlei's law firm would represent the plaintiff in the very same action wherein Mr. Schlei represented affiant and in his capacity as an attorney for a defendant met with other defendants and their counsel to discuss and plan defense strategy.

17. At no time did Mr. Schlei advise affiant that Mr. Schlei's law firm intended to file a thirty million dollar ($30,000,000.00) lawsuit against affiant and others in federal court based upon the same underlying transactions as alleged in the state action, A-43922.

18. Upon information and belief, and to the best of affiant's knowledge, at no time did Mr. Schlei or any other member of his law firm contact any of the other defendants in Case No. A-43922 or their counsel, who were present at the defense strategy meeting, and disclose his relationshhp with the Munger, Tolles, Hills & Rickershauser firm or the fact that the same law firm was being specially engaged as counsel in these matters on the other side.

19. Since November of 1969 Mr. Schlei's firm has been and is counsel of record for the plaintiff in Case A-43922, and affiant has never consented to Mr. Schlei or his law firm representing the plaintiff in that action.

20. Affiant agreed to have Mr. Schlei's firm investigate the overall relationship between old management and new management of First Western Savings and Loan Association, on behalf of the Federal Home Loan Bank Board, but affiant was never advised, nor did he ever consent to having Mr. Schlei or his law firm represent the plaintiff in this litigation.

21. I know that my trial counsel, William G. Simon and Thomas R. Sheridan of Simon, Sheridan, Murphy, Thornton & Medvene, met with Mr. Hills of Munger, Tolles, Hills & Rickershauser in January of 1969, and I authorized them to give Mr. Hills a copy of the letter I received from Mr. Schlei dated June 7, 1967, (Exhibit A).

22. I know that my trial counsel wrote to Mr. Hills on February 13, 1970, stating that the Munger, Tolles, Hills & Rickershauser law firm has a conflict of interest in these cases. I received a copy of said letter. I authorized the sending of such a letter.

23. In my personal opinion Mr. Schlei and his law firm have a conflict of interest in these cases, and they should not be allowed to represent the plaintiff in these cases.

Further affiant sayeth not.

Dated: March 26, 1970.

/s/ Albert G. Neumeyer
Albert G. Neumeyer

Subscribed and sworn to before me this 26th day of March, 1970.

/s/ Harriett L. Maas
Notary Public

[Seal]

Law Offices
Munger, Tolles, Hills & Rickershauser
Eleventh Floor
606 South Hill Street
Los Angeles, California 90014
MAdison 6-1491
Area Code 213

June 7, 1967

E. Leroy Tolles
Roderick M. Hills
Charles E. Rickershauser, Jr.
Richard D. Esbenhade
Christian E. Markey, Jr.
Frederick B. Warder, Jr.
Carla Anderson Hills
James M. Adler
William J. Bird

Of Counsel
Charles T. Munger
Norbert A. Schlei

Cable Address
Muntoll

Mr. A. G. Neumeyer
405 N. Bedford Drive
Beverly Hills, California

Dear Al:

Enclosed herewith is the copy of the complaint you gave me yesterday. I have made a xerox copy for my files.

It seems to me essential that in the discovery proceedings which are conducted in this matter, close attention be paid to the development of your defense that you

did not participate in the matters of which the plaintiff complains. In this regard, I think it will be essential to file written interrogatories addressed to the plaintiff corporation as well as to take the depositions of the three individuals involved. Both the interrogatories and the depositions should attempt to pin down as precisely as possible what the contentions of the plaintiff are, not only as to what they claim was done that was wrong, but when it was done, who participated in it, and how each of the defendants is alleged to have participated. If this is done right, there might be some chance that you could get out of the action at an early stage on a motion for summary judgment.

I think you should write to Galane and tell him that you would like close attention to be paid, throughout the discovery proceedings, to the development of your defense that you were not a participant in any of the activities that are alleged to have been wrongful. There is no reason why he cannot do this while developing at the same time the defense that nothing wrongful was done by anyone. However, if you have any doubt that Galane will watch out for your interests in this regard, it might be worthwhile to have someone representing you alone (1) look over the defendants' interrogatories before they are filed and (2) attend the principal depositions. Your representative would not necessarily have to make an appearance in the action or ask questions himself; he could simply make sure that defendants' counsel are reminded to ask the questions that your interests require be asked.

Since I gather that you have confidence in Galane, it probably is not necessary for you to have separate counsel, at least at this stage. However, I would sug-

gest that you take the precaution of giving him written instructions as to the development of any defenses you might have that the others do not have. Although you intend to side with the defendants across the board even if separate defenses on your part can be established, there is no reason why your separate defenses should not be developed as aggressively as all other defenses.

If there is any way that I can be helpful as this matter progresses, I hope you will not hesitate to let me know.

All best regards.

Sincerely,

/s/ Nobert A. Schlei
Norbert A. Schlei

NAS/cr
Enclosure

APPENDIX "L."

Assignment and Agreement.

AGREEMENT dated as of September 24, 1968, between FIRST WESTERN SAVINGS AND LOAN ASSOCIATION, a savings and loan association organized and existing under the laws of the State of Nevada ("the Association"), and FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION ("the Corporation");

WHEREAS, certain moneys have been advanced and additional moneys may be advanced by the Corporation to the Association pursuant to that assistance agreement ("the Assistance Agreement") entered into by the Corporation and the Association, dated December 19, 1966; and

WHEREAS, the Corporation desires additional security for moneys previously advanced and moneys that may be advanced; and

WHEREAS, the Corporation is of the opinion that additional security may exist by reason of certain claims hereinafter described, including those claims encompassed in Case No. A-43922 now pending in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark; and

WHEREAS, the Corporation believes it to be in the public interest for it to acquire and pursue such claims; and

WHEREAS, the Association is willing to have the Corporation acquire and pursue such claims;

NOW, THEREFORE, it is agreed as follows:

(1) The Association hereby assigns all of its interest in any and all claims it may possess against any officers, employees, or directors of the Association or of First Western Financial Corporation ("Financial"), Financial, any shareholders of Financial, any persons or parties acting as consultants or advisors to the Association or Financial and any other persons or parties acting with or on behalf of the foregoing that arise out of transactions occurring prior to December 1, 1966, including all such claims encompassed in the aforementioned Case No. A-43922, and all such claims arising by reason of transactions by persons or parties in the stock of Financial.

(2) The costs incurred by the Corporation in pursuing the claims acquired hereby shall not be the responsibility of the Association. This shall not affect the right of the Corporation to be reimbursed for expenses in the manner set forth in (3) below.

(3) Any proceeds from these claims, including settlement of them, shall be used first, to reimburse the Corporation for all expenses incurred by the Corporation in the pursuit of such claims, including but not limited to attorneys' fees, travel expenses, court costs, and all related litigation expenses, and all actual costs of the Corporation that may be fairly prorated to the pursuit of such claims, and second, to reduce the amount of any moneys still outstanding by reason of advances made by the Corporation to the Association pursuant to the Assistance Agreement. Any additional proceeds shall be transferred to the Association.

(4) Nothing in this Agreement shall be construed (i) as affecting in any way the rights or obligations of

the Corporation under the Assistance Agreement, or (ii) excepting as is expressly set forth herein, as affecting the rights or obligations of the Association; provided, however, that the second sentence of §7.5 of the Assistance Agreement which obligates the Association to indemnify the Corporation in certain respects shall not be applicable to any liabilities incurred by reason of actions taken by the Corporation under this Assignment.

(5) The Corporation agrees that it will not settle any claims assigned hereby without including in such settlement the release of any claims brought against any directors of the Association who have served since July 19, ... where such claim has arisen as a result of some action taken by the Corporation pursuant to this Assignment and Agreement.

(6) The Association will execute all documents necessary or appropriate to effect or to perfect this Assignment, including a substitution of parties in the afore-mentioned Case No. A-43922; the Association will cause all of its files and the files of any of its attorneys that are relevant to this assignment to be made available to the Corporation and its attorneys; and the Association, its officers, directors and employees will cooperate with the Corporation in its efforts hereunder.

(7) Nothing contained herein shall obligate the Corporation to take any action on any claim, nor shall the Corporation have the responsibility for any action it takes or fails to take in its pursuit of these claims.

(8) The Corporation will cooperate with the Association to reassign any claims acquired hereunder that

are outside the scope of any intended action by the Corporation but which are needed by the Association to permit it to carry on its ordinary and regular course of business.

IN WITNESS WHEREOF, the parties hereto have caused this Assignment and Agreement to be duly executed the day and year first above written.

Accepted and Agreed to by:
FIRST WESTERN SAVINGS AND LOAN ASSOCIATION
By George H. Haley President
FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION
By I. M. Broullire Deputy Director
FIRST WESTERN FINANCIAL CORPORATION
By John Henry Brebbia President

Attest:
R. W. Hine Acting Secretary

Attest:
Joseph O. Sullivan Assistant Secretary

Attest:
Ellis E. Meredith Secretary